

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1902.

No. 957.

ST. LOUIS SAN FRANCISCO AND TEXAS RAILWAY COM-
PANY, PLAINTIFF IN ERROR.

vs.

MAUDE HEALE, F. H. HEALE AND J. H. HEALE.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE NINTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

WRIT DOWNGRADED 24-1902.

(12-1902)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 857.

ST. LOUIS, SAN FRANCISCO AND TEXAS RAILWAY COM-
PANY, PLAINTIFF IN ERROR,

vs.

MAUDE SEALE, F. H. SEALE, AND J. E. SEALE.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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Caption.

STATE OF TEXAS,
County of Grayson:

At a regular term of the Honorable District Court for the 15th Judicial District of Texas, within and for Grayson county, which came on and was held at the court-house of said county in the city of Sherman, on Monday, April 4th, 1910, and which will adjourn on Saturday, October 1st, 1910, the Hon. B. L. Jones, judge thereof presiding; the following proceedings among others, came on and were had, to-wit:

No. 18311.

MAUDE SEALE et al.
vs.
ST. L., S. F. & T. RY. CO.

Pl'tffs' 2nd Amended Original Petition.

Filed 4/11/10.

No. 18311.

MAUDE SEALE et al.
vs.
ST. L., S. F. & T. RY. CO.

Suit Pending in the District Court of Grayson County for the 15th Judicial District.

To the Honorable Judge of said Court:

Now comes Maude Seale, F. H. Seale and J. E. Seale, plaintiffs in the above styled and numbered cause, and after having obtained leave of the court, files this as their second amended original petition, amending their first amended original petition, filed herein on Nov. 9, 1909, and for such amendment say:

2 Complaining of the defendant, the St. Louis, San Francisco & Texas Railway Company, a corporation duly incorporated and organized under the laws of the State of Texas, represent that defendant has already duly filed its answer herein.

That defendant corporation did, at the time of the happening of the matters and things hereinafter complained of, and does now, maintain railway yards, round houses, shops and terminals in what is known as North Sherman, Grayson County, Texas, wherein trains, locomotives and cars were, and are, switched and propelled for the purpose of taking to pieces and making up trains;

said place also being a division point, and is maintained and used for the purpose of terminals for trains arriving there and for trains that leave said point.

That heretofore, to-wit: on the night of January 16, 1909, Memory T. Seale, was in the employment of the defendant in the capacity of a clerk, known and designated as seal or yard clerk, and performed his duties at night at said above described railway yards and terminals. That on said day about 7:45 o'clock P. M., he was performing his said duties in said railway yards when defendant recklessly, carelessly and negligently propelled and ran a locomotive against and over deceased, thereby cruelly crushing, wounding and mutilating him to such an extent as to cause his death within a few minutes after he received said injuries. That said Memory T. Seale, hereinafter known as "deceased", was struck and killed in the following manner, to-wit:

While performing his duties and acting in the scope of his authority, he was on his way from a compartment or building known as a "box car", which was, among other things, used as a telegraph station and office, situated on or near the east side of said railway yards, with dispatches, messages and papers to be by him delivered to a clerk in an office building maintained on or near the west side of said yards, when he heard a freight train coming in from the north, bound for said yards and terminals, and was told by the night yard master of the defendant, who was then and there the superior of deceased, to hurry up with his errand and return and check up the incoming train, as it was desired to make up a train at once to go out of said terminals to the south, and certain cars would have to be incorporated in said train which were then in the train coming in from the north.

That it was then and there the duty of deceased to obey said yard master, and it was then and there his duty to check up said incoming train by obtaining the name, number, and designation of the cars of said incoming train, and report the same to a night yard clerk that had his place of business in the office building in the west side of said yards. That after receiving said instruction from the yard master, deceased continued on his way to said office building in the west of said yards, and delivered his dispatches, messages and papers to the night yard clerk therein, and picked up his lantern and started in a northeasterly direction for the purpose of meeting said incoming train, and after he had gotten a short distance from said office, the defendant's locomotive engaged in switching and propelling cars in said yards, backing up from the south, came up behind deceased, and diagonally behind him, and without notice or warning struck, ran over and cruelly

4 killed him as aforesaid.

That defendant was guilty of gross carelessness and negligence, causing said deceased to be struck and killed as aforesaid, as follows: to-wit: The railway track upon which said locomotive was being backed was just east of the office building heretofore

described, situated in the west part of the yards, and was entirely too close to the same; that the door to the same opened to the north at and near the west side of said building, so that locomotives and engines coming up said track from the south were obscured by said office building from the view of deceased until he was immediately in front thereof; there was no light on the tender of said locomotive as it was backed up said track on said occasion. Said locomotive was running at a very dangerous and rapid rate of speed, to-wit: about 25 miles per hour; that said locomotive had been down south on what was known as the "Y," to leave a car, and was backing north for the purpose of coming on a switch and heading in to the east part of said yards. That when said locomotive was ready to start north, after leaving said car, it blew no whistle and did not ring its bell before starting, nor did it blow its whistle on said locomotive, or ring its bell, from the time it started from the south until it had run over and killed the deceased. That the rules of the defendant required that said whistle be blown before said locomotive be started to backing, and that the bell thereon should be kept ringing during the time it was in

5 motion; that it was the custom of defendant's employes operating switch engines to blow the whistle and keep the bell ringing on locomotives when starting and during its movement; that it was the custom of the defendant's employes propelling its switch engines to blow its said whistle and ring its said bell when coming on or coming off of, said "Y"; that it was then and there the duty of the defendant's employes operating said switch engine to blow its said whistle and ring its said bell when moving its said switch engine as aforesaid, independent of any custom or rules, for the proper protection of persons who might be rightfully in, and using, said railway yards; that there was no person on the back end of said tender of said engine, being the front as the engine was backing, to keep a lookout for persons who might come in the way of said locomotive; that the rules and custom of the defendant company required some person should always be on the rear of the tender of a switch engine when backing being the front end as it is backing for the purpose of keeping a lookout; that the custom of the defendant required that persons should be on the rear of said tender as it backed for the purpose of keeping a lookout; that independent of said rules and customs it was necessary and proper to have some person on the rear of said tender as said locomotive was backing for the purpose of keeping a lookout for persons or other obstructions that might be in and upon said tracks in said railway yards at said time. That if there had been some person on the rear of said locomotive tender as it backed up on this occasion, he could have seen deceased in time to have prevented his

6 injuries and death; that the engineer and fireman then and there in charge of, operating and propelling said switch engine failed and refused to keep a lookout for persons on said track; that if they had kept said lookout they could have seen deceased in time to have prevented his being struck and killed

as aforesaid; that said engineer and fireman did then and there see the deceased and his peril, and that the deceased was unaware of his peril, in time to have prevented striking him, but failed and refused to warn deceased, or stop said engine or slow up the same, and used no other precaution for his safety; that the engineer; fireman, switchmen and employés of defendant then and there working on and in connection with, said locomotive, then and there saw deceased, and saw that he was in peril, and that he was unaware of his peril, in time to have prevented striking him with the use of appliances at their command, but failed and refused to stop said locomotive, or undertake to stop the same; that they saw said deceased, and saw his peril in time to have warned him of his danger and prevented his being struck and killed, but that they then and there failed to warn him, and failed to stop or slow up said locomotive, or use any other precaution for deceased's safety. That at the time deceased was run over and struck as aforesaid, he was traveling along a well defined and marked road, or pathway, that crosses the track he was on, that lead from said office in the west yards, under and between the trestle and incline, to the coal chutes, to the east yards and the telegraph office thereof; that said pathway and road had been in use by employés, and the public, with

7 the knowledge and acquiescence of said defendant for a long period of time, and that it was well known to defendant that said pathway, or road, was used by its employés, and other persons not engaged in switching trains, who were rightfully in said yards at all times of the day and night, for a long time prior to the time deceased was killed, or it could have been known by the use of ordinary care. Yet defendant's employés then and there in charge of and operating said switch engine failed and refused to give notice of its approach to said road or pathway, by blowing the whistle or ringing the bell, or in any other manner, and then and there failed and refused to keep a lookout for persons that might be using the same; that if said signals had been given, or if the proper lookout had been kept, deceased could have been warned of the approach of said locomotive, and the same could have been stopped in time to have prevented deceased's injuries and death as aforesaid. That said deceased was a young man, and a raw hand at the work that he was engaged in at said time, having entered his employment for the first time at 7 o'clock on the night he was killed, and did not know the danger incident to the performance of his duties under the circumstances hereinbefore set forth, and was not instructed as to the same by the defendant. That all of said acts of negligence, as hereinbefore set forth, were well known to the defendant prior to the time deceased was killed, or could have been known by the use of ordinary care, in time to have prevented the same, and the consequent death of the deceased;

8 but the same were unknown to deceased. That by reason of all of said acts of negligence, jointly and severally, deceased was struck and cruelly killed as aforesaid.

Plaintiff, Maude Seale, is the surviving wife of deceased; and

plaintiffs, F. H. Seale and J. E. Seale are the father and mother of said deceased, respectively.

That deceased left no children surviving him and plaintiffs herein named have the sole right to sue for damages by reason of the death of deceased.

That at the time deceased was killed he was a young man 25 years of age, strong, healthy, robust, vigorous, energetic, and bid fair to live to an old age, to-wit: the age of 80 years, but for his untimely death as aforesaid.

At the time and prior to the death of deceased, he was yard and night clerk as aforesaid, and a laborer, and earned large sums of money as such, to-wit: the sum of One Hundred (\$100.00) Dollars per month; that his time and services were reasonably worth said sum, and would have continued to be worth said sum, and a larger sum, by reason of promotion in said occupation; but by reason of his untimely death, his time and services have been wholly lost to plaintiffs. Decedent contributed all of his earnings to plaintiffs, and would have continued to have contributed the same to them during the remainder of his and their lives, except for his untimely death as aforesaid. That plaintiff, Maude Seale, is 24 years of age, and plaintiffs, F. H. and J. E. Seale, are 66 years of age respectively, and all of said plaintiffs have a reasonable prospect of living to the age of 80 years each.

That by reason of the premises, plaintiffs have been damaged in actual damages in the sum of Thirty Five Thousand (\$35,000.00) Dollars.

Wherefore, plaintiffs sue, and defendant having already answered herein, they pray that upon final trial they have judgment for their damages and costs of suit; and that said damages be apportioned among them as required by law.

J. H. WOOD,
J. P. HAVEN,
Attorneys for Plaintiff.

Filed April 11, 1910. K. S. Loving, Clerk District Court, Grayson County, Texas.

Order Granting Plaintiffs Leave to File 2nd Amd. Pet.

18311.

MAUDE SEALE et al.
v.
St. L., S. F. & T. Ry. Co.

APRIL 11TH, 1910.

This day leave is hereby granted the plaintiffs in the above styled cause to file their second amended original petition herein.

Answer of Def'd'ts.

In 15th. District Court, Grayson County, Texas.

No. 18311.

Filed 4/6/09.

MAUDE SEALE et al.

VS.

ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY CO.

Now comes the defendant, St. Louis, San Francisco & Texas Railway Company and says:

- 10 First. Defendant demurs generally to plaintiff's petition because the facts therein alleged show no cause of action.

HEAD, DILLARD, SMITH & HEAD.

Attorneys for Defendant.

Second. Defendant demurs specially to plaintiff's petition because; first, it is too general, vague and indefinite, both (a) in stating the acts of negligence charged against the defendant and (b) the injuries received by plaintiff. Second; Because said petition does not show whether or not at the time said Seale was injured he was engaged in the handling of interstate commerce; Third, said petition does not show whether or not defendant, at the time it committed the acts complained of was engaged with respect thereto in the handling of interstate commerce; Fourth, said petition does not show whether or not plaintiff's right to recover and defendant's liability and defenses are governed by an act of Congress passed April 22nd, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employés in Certain Cases."

HEAD, DILLARD, SMITH & HEAD.

Attorneys for Defendant.

Third. Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof thereof.

HEAD, DILLARD, SMITH & HEAD,

Attorneys for Defendant.

- 11 Fourth. Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by plaintiffs' own negligence and want of ordinary care and by that of deceased M. T. Seale and his fellow servants. The said injuries, if any were received, resulted from one of the risks assumed by plaintiff and by deceased M. T. Seale. That of the said defects and

causes which produced the injuries complained of, if any were produced, the plaintiff and said deceased M. T. Seale had full notice, or by the exercise of ordinary care on his part, would have had full notice in ample time to have avoided the same.

The deceased was guilty of contributory negligence in that he went upon said track immediately in front of said engine; he went upon said track without exercising any precaution for his own safety; he did not stop, look or listen before entering upon said track; he went upon said track in a run or trot; he was guilty of negligence in going upon said track and in undertaking to cross same at the time when, the place when and the manner in which he did.

Wherefore defendant prays to be discharged with its costs.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Filed April 6, 1909, K. S. Loving, Dist. Cl'k, By W. S. Reeves, Dept.

12 *Order Overruling Def't's Special Exceptions.*

18311.

MAUDE SEALE et al.

v.

ST. L., S. F. & T. RY. CO.

FEB'Y 15, 1910.

This day, it is ordered that defendant's 2nd, 3rd and 4th special exceptions, contained in its answer herein, be, and are hereby in all things overruled; to which ruling said defendant in open court excepts.

No. 18311.

MAUDE SEALE et al.

vs.

ST. L., S. F. & T. RY. CO.

Tried in the 15th District Court of Grayson County, Texas, April Term, 1910.

Charge.

Filed 5/12/10.

GENTLEMEN OF THE JURY: The undisputed evidence in this case shows that Memory T. Seale was killed in defendant's yards north of Sherman on the early night of the 16th of January, 1909, by

being run over by one of the switch engines owned and controlled by defendant company; that he left surviving him at the time of his death his wife, Maude Seale, and his father, F. H. Seale, and his mother, J. E. Seale, all of whom are plaintiffs in this cause; that the said Memory T. Seale was at the time of his death in the employ of the defendant company as yard clerk and that he had just gone to work for said company in this capacity, but had worked for said company previously in another capacity.

Upon the law of this case you are instructed as follows:

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1. By the term "Negligence" when used in this charge, is meant the failure to exercise that degree of care which an ordinarily prudent person would have exercised under the same or similar circumstances; or in other words negligence is the doing of an act which an ordinarily prudent person would not have done under the same or similar circumstances or the failure to do an act which an ordinarily prudent person would have done under the same or similar circumstances.

2. By the term "Ordinary Care," when used in this charge, is meant such degree of care as an ordinarily prudent person would have exercised under the same or similar circumstances.

3. "Contributory Negligence" is such negligence on the part of a person receiving an injury as, concurring with the negligence of some one else causing the injury, proximately contributes to bring about the injury received.

4. If you believe from the evidence that on the occasion in question the switch engine that ran over and killed deceased Memory T. Seale had been brought upon the track over which it was being operated at the time of the death of said Seale by the crew operating said engine without the bell on same being rung or the whistle sounded; and if you further believe from the evidence that said engine had been moved along said track by said crew without the ringing of said bell until it struck the said Seale; and if you further believe from the evidence that had said whistle or bell been sounded at the time said engine was brought upon said track or had

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said bell been sounded in the vicinity of where said Seale was killed the said Seale would have received notice of the movement of said engine and would not have attempted to cross in front of same on said occasion; and if you further believe from the evidence that the failure of the employes of defendant operating said engine at said time to sound said whistle and ring said bell when said engine entered upon said track or to sound said bell while said engine was being operated upon said track in said vicinity, if any such failure you find there was, was negligence, as that term has been hereinbefore defined to you, and that said negligence was the proximate cause of said Memory T. Seale's being run over and killed by said engine; or if you believe from the evidence that in the exercise of ordinary care for the safety of other employes that might be in the rightful use of defendant's said yards in the vicinity of where said Seale was run over and killed one of defendant's employes composing the switch crew in charge of said engine on said

occasion should have ridden on the footboard in the rear of the tender of said engine, that is, on the footboard that was in the front the way in which said engine was moving at said time; and if you further believe from the evidence that there was no such employé in said place on said occasion; and if you further believe from the evidence that if there had been one of said employés so situated he could have discovered said Seale in time, in the exercise of ordinary care to have prevented the death of the said Seale;

and if you further believe from the evidence that in the failure to have some one of said employés stationed on said footboard on said occasion, if any such failure you find there was, defendant was guilty of negligence and that such negligence, if any, was the proximate cause of said Seale's death; again, the undisputed evidence shows that one Brewer was a member of the switch crew of said engine and that on said occasion he was riding on one of the footboards of said engine, so if you believe from the evidence that said Brewer saw the deceased Memory T. Seale just before he was run over by said engine; and if you further believe from the evidence that it reasonably appeared to said Brewer and he believed that said Seale would probably attempt to cross said track in front of said engine at such time as that he would probably be struck by said engine, and that said Brewer realized the perilous situation of said Seale in time, by the use of means he had at hand, to have avoided the said engine striking the said Seale; and if you further believe from the evidence that the said Brewer failed to use such care in the use of the means, if any, he had at hand to avoid said Seale's being struck by said engine as an ordinarily prudent person would have used under the same or similar circumstances; and if you further believe from the evidence that in such failure, if any you find there was, said Brewer was guilty of negligence, as that term has been hereinbefore defined, and that such negligence, if any, was the proximate cause of said Seale's death, then in any of these three events you will find for plaintiffs and assess their damages as hereinafter directed unless you should find for defendant under other instructions given you in charge.

16 5. In reference to the two first issues submitted to you relating to the negligence, if any, of defendant in the failure, if any, of defendant's employés operating said engine to ring the bell or sound the whistle of said engine, or to have some one riding on a footboard in front the way the engine was moving as same were submitted to you in the foregoing paragraph of this charge you are instructed that if you do not believe from the evidence that an ordinarily prudent person would have sounded said whistle or rung said bell at the time said engine entered upon said track on the occasion in question, or would have rung said bell at the time said engine was approaching and in the vicinity where said Seale was killed, you will find for defendant on this one of said issues; or if you do not believe from the evidence an ordinarily prudent person would have had some one of said employés to have ridden on said footboard on said occasion, you will find for de-

fendant on this one of said issues; or if you believe from the evidence the deceased M. T. Seale on the occasion in question was going hurriedly across the railway yards of defendant on said occasion and did not stop to look or listen for the approach of an engine as he attempted to cross said track; and if you further believe from the evidence that in doing as you find from the evidence he did do on said occasion he was himself guilty of negligence either in the manner you find from the evidence he was crossing said yards or in his not taking the precaution to stop and look and listen for any engine that might be on said track, then you will find for defendant on the two above named issues.

17 Again in reference to these two issues you are instructed if you believe from the evidence that in the usual and customary way of doing the work of operating a switch engine in said yards those operating same did not ring the bell in the vicinity of where plaintiff was injured; and if you further believe from the evidence that plaintiff knew, or, in the exercise of ordinary care for his own safety, should have known that the bell was not rung on said occasions and in such vicinity, then you will find for defendant on the issue of negligence in reference to the failure to ring the bell of said engine while same was approaching and in the vicinity of where said Seale was killed; also, if you believe from the evidence that under the usual and customary methods of moving a switch engine in the vicinity of where said Seale was killed it was not customary for one of the crew to ride in front the way in which said engine was going; and if you further believe from the evidence that the said Seale knew of this custom, or, in the exercise of ordinary care for his own safety, should have known of same, then you will find for defendant on the issue of whether it was negligence to not have had some member of said crew riding on the front footboard the way said engine was going.

6. On the issue as to whether the said Brewer was guilty of negligence as the same was submitted to you in paragraph Four of this charge, you are instructed if you do not believe from the evidence that the said Brewer when he saw the said Seale moving towards

the track on which the said engine was moving realized that
18 he, Seale, was in a perilous position and that he would probably attempt to cross the track in front of said engine; or if you believe from the evidence that the said Brewer saw said Seale and realized his danger and peril and that it reasonably appeared to him and he believed that the said Beale would probably attempt to cross the track in front of said engine and be struck by same, yet if you further believe from the evidence that when said employé realized said Seale's perilous position, if you find he did, he could not, in the exercise of ordinary care by the use of the means he had at hand, avoid said Seale's being struck by said engine; or if you believe from the evidence that said Brewer on said occasion exercised ordinary care to use all the means he had at hand to avoid said Seale's being struck, then in any of these events you will find for defendant on this issue.

7. The burden of proof is on the plaintiffs to prove by a preponderance of the evidence, by which is meant the greater weight and degree of credible testimony, the facts which will entitle them to recover. You are the exclusive judges of the facts proven, of the credibility of the witnesses, and of the weight to be given the testimony, but the law you will receive from the court as given you in charge and be governed thereby.

8. If, under the foregoing instructions, you find that the plaintiffs, or any of them, are entitled to recover you will assess their damages at such sum as represents the present worth or value of the future pecuniary aid which you find and believe from the evidence the said

Seale would have contributed to them had he lived; and if you find in favor of more than one of said plaintiffs you will apportion the amount so found among the plaintiffs for whom you have found in such sum as you may determine each is entitled to receive.

9. If you find for plaintiffs the form of your verdict may be "We, the jury, find for plaintiffs and assess their damages at \$—, filling the blank with the amount you find, and we apportion said sum as follows," naming the amount and the party to which said sum is apportioned. If you find for defendant you will simply so state. Of course if you should find for only one of said plaintiffs there would be no amount to apportion. Let your verdict be signed by your foreman whom you will select from your number when you retire.

B. L. JONES, *Judge*.

Filed May 12, 1910. K. S. Loving, Clerk District Court, Grayson County, Texas.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE et al.

vs.

St. L., S. F. & T. Ry. Co.

Requested Charge No. 1.

The defendant requests the court to instruct the jury as follows:

1. In this case you will return a verdict in favor of defendant.

HEAD, DILLARD, SMITH & HEAD,

Attorneys for Defendant.

Requested and refused immediately before the general charge had been read to the jury.

B. L. JONES, *Judge*.

20 Filed May 12, 1910. K. S. Loving, Clerk District Court.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE et al.

vs.

ST. L., S. F. & T. RY. CO.

Requested Charge No. 2.

The defendant requests the court to instruct the jury as follows:

2. The undisputed evidence in this case shows that at the time of his death decedent, M. T. Seale was guilty of contributory negligence, and you will therefore return a verdict in favor of defendant; unless you find for plaintiff upon the issue of discovered peril as submitted to you in the latter portion of paragraph 4 of the general charge.

HEAD, DILLARD, SMITH & HEAD,

Attorneys for Defendant.

Requested and refused immediately before the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, Clerk District Court.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE et al.

vs.

ST. L., S. F. & T. RY. CO.

Requested Charge No. 3.

The defendant requests the court to instruct the jury as follows:

21 3. The evidence in this case fails to show that defendant was guilty of any negligence in failing to ring the bell and blow the whistle on the engine which killed the deceased at the time and before he was killed, and you will therefore return a verdict for defendant on this issue.

HEAD, DILLARD, SMITH & HEAD,

Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, Clerk District Court.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE et al.

vs.

St. L., S. F. & T. Ry. Co.

Requested Charge No. 4.

The defendant requests the court to instruct the jury as follows:

4. The evidence in this case fails to show that if the bell had been rung or the whistle blown on the engine that killed the deceased at the time and before he was killed that it would have prevented the death of the deceased, and you will therefore return a verdict in favor of defendant on the issue of alleged negligence in failing to blow the whistle and ring the bell.

HEAD, DILLARD, SMITH & HEAD,

Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

22 Filed May 12, 1910. K. S. Loving, Clerk District Court.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE et al.

vs.

St. L., S. F. & T. Ry. Co.

Requested Charge No. 5.

The defendant requests the court to instruct the jury as follows:

5. The evidence in this case does not show that defendant was guilty of any negligence in failing to have an employé on the footboard at the front end of the engine that killed the deceased, and you will therefore return a verdict in favor of defendant on the issue of failing to have an employé on the footboard of said engine at the front end of the same.

HEAD, DILLARD, SMITH & HEAD,

Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, District Clerk.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE et al.
vs.
ST. L., S. F. & T. RY. Co.

Requested Charge No. 6.

The defendant requests the court to instruct the jury as follows:

23 6. The evidence in this case fails to disclose that if defendant had provided a man on the footboard of the front end of the engine that approached the deceased, M. T. Seale, at the time he was killed, that the presence of such man would or could have prevented the death of the deceased, and you will therefore return a verdict in favor of defendant on the issue of negligence claimed that defendant failed to provide a man on the footboard of such engine.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, Clerk District Court.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE et al.
vs.
ST. L., S. F. & T. RY. Co.

Requested Charge No. 7.

The defendant requests the court to instruct the jury as follows:

7. The evidence in this case discloses that if there was any negligence on the part of the agents of defendant that caused the death of the deceased, that such negligence was the negligence of the employees operating the switch engine that run over and killed deceased, and you are instructed that in this case that this is a suit for damages on account of injuries resulting in death and that in

24 such a suit a recovery cannot be had by the representatives and relatives of the deceased on account of injuries received by his fellow servants, and that such servants in charge of and operating said switch engine were the fellow servants of deceased, and you will therefore return a verdict in favor of defendant.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge*.

Filed May 12, 1910. K. S. Loving, Clerk District Court.

In 15th District Court, Grayson County, Texas.

MAUDE SEALE et al.

vs.

ST. L., S. F. & T. RY. CO.

Requested Charge No. 8.

Defendant requests the court to instruct the jury as follows:

8. If you believe from the evidence that the death of M. T. Seale was an accident, that is the evidence fails to disclose negligence causing the death either on the part of the defendant or its employes or on the part of deceased, then you will find for defendant.

HEAD, DILLARD, SMITH & HEAD,

Attorneys for Defendant.

Refused.

B. L. JONES, *Judge*.

Filed May 12, 1910. K. S. Loving, Clerk District Court.

25 In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE et al.

vs.

ST. L., S. F. & T. RY. CO.

Requested Charge No. 9.

9. At the request of the defendant you are instructed that if you find and believe from the evidence that it was not usual and customary for defendant's employes in charge of its switch engines to ring the bell or blow the whistle thereon as the same passed or just before the same reached the place at which deceased was killed, you will find for the defendant upon the issue of alleged negligence in not having the bell rung or whistle blown on the occasion of said accident.

HEAD, DILLARD, SMITH & HEAD,

Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge*.

Filed May 12, 1910. K. S. Loving, Clerk District Court.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE et al.
vs.
ST. L., S. F. & T. RY. CO.

Requested Charge No. 10.

10. At the request of the defendant you are instructed that if you find and believe from the evidence that it was not usual and customary for one of the defendant's employes on its switch engines to ride upon the rear footboard as the same was backing up; that is, the forward footboard in backing as the same passed the place at which deceased was killed, you will find for the defendant upon the issue of alleged negligence in not having some one upon said footboard at the time of said accident.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, Clerk District Court.

In 15th District Court, Grayson County, Texas.

MAUDE SEALE et al.
vs.
ST. L., S. F. & T. RY. CO.

Requested Charge No. 11.

Defendant requests the following instruction:

11. You are instructed that when deceased undertook to perform the duties of the position of yard clerk, in the absence of proof, he is presumed to have understood the duties of such position and of the dangers ordinarily incident thereto.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Asked immediately after the main charge was read to the jury and refused.

B. L. JONES, *Judge.*

27 Filed May 12, 1910. K. S. Loving, Clerk District Court.

In Fifteenth District Court, Grayson County, Texas.

MAUDE SEALE et al.

vs.

St. L., S. F. & T. Ry. Co.

Requested Charge No. 12.

Defendant requests the following instruction:

12. The evidence discloses that deceased was found on a railroad track at a point where, according to the undisputed evidence, he could have seen and heard the approach of the engine that killed him, under the circumstances the burden is on the plaintiffs to show by a preponderance of the evidence that deceased was in the exercise of ordinary care at the time he went upon and was on said track, and when plaintiffs have so shown, you will return a verdict for defendant.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, Clerk District Court.

In Fifteenth District Court, Grayson County, Texas.

No. 18311.

MAUDE SEALE et al.

vs.

St. L., S. F. & T. Ry. Co.

Requested Charge No. 13.

Defendant requests the court to instruct the jury as follows:

28 13. The plaintiffs in this case are not shown to be the legal representatives of the deceased M. T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, Clerk District Court.

In Fifteenth District Court, Grayson County, Texas.

No. 18311.

MAUDE SEALE et al.

VS.

ST. L., S. F. & T. RY. CO.

Requested Charge No. 14.

14. In no event are the plaintiffs, F. H. Seale and J. E. Seale entitled to recover any sum in this case.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, Clerk District Court.

29 In Fifteenth District Court, Grayson County, Texas.

No. 18311.

MAUDE SEALE et al.

VS.

ST. L., S. F. & T. RY. CO.

Requested Charge No. 15.

15. If, under the foregoing instructions, you find for the plaintiffs or either of them, you will assess their damages at such a sum as a present cash payment will fairly and reasonably compensate them for the pecuniary loss which they may have suffered by reason of the death of the said Memory T. Seale.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and given immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, Clerk District Court.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE et al.

vs.

ST. L., S. F. & T. RY. CO.

Requested Charge No. 16.

16. At the request of the defendant you are instructed that the undisputed evidence in this case shows that the deceased, at the time of his death, and in performing the duties, in the performance of which he was engaged at the time of his death, and out of the performance of which arose the relation and respective duties between him and defendant, on account of which defendant is liable herein to plaintiffs, if liable at all, was engaged in interstate commerce, and
30 plaintiffs' rights of action, if any, are governed by the acts of Congress applicable to interstate commerce, and you will therefore return your verdict in this case for defendant.

HEAD, DILLARD, SMITH & HEAD,

Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, Clerk District Courts.

In Fifteenth District Court, Grayson County, Texas.

No. 18311.

MAUDE SEALE et al.

vs.

ST. L., S. F. & T. RY. CO.

Requested Charge No. 17.

17. If you believe from the evidence at the time that M. T. Seale was killed that he was proceeding from the office of defendant in its yards at Sherman to a train for the purpose of taking the numbers of the cars in said train, and that said train had just arrived in said yards from the north and that the same train was a freight train, and that the freight in said train had been transported from another state into the state of Texas, and was being delivered into the yards of defendant, then you are instructed that at the time of his death that plaintiff was in the service of defendant engaged in interstate commerce, and if you so believe, then you are instructed that plain-

31 tiffs are not entitled to recover in this case, and you will therefore return your verdict in favor of defendant.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed May 12, 1910. K. S. Loving, Clerk District Court.

18311.

MAUDE SEALE et al.
vs.
ST. L., S. F. & T. RY. CO.

MAY 12TH, 1910.

Judgment.

On this day the above numbered and styled cause coming regularly on for trial, came the plaintiffs in person and by their attorneys and the defendant appeared by its attorneys and all parties announced ready; then came a jury of twelve good and lawful men, viz., J. W. Jordan and eleven others, who, having been duly selected, tried, empaneled and sworn, and having heard the pleadings, the evidence, the argument of counsel and charge of the court, retired to consider of their verdict, and afterwards returned into open Court, in due form of law, the following verdict, which was received by the court, and is here now entered upon the Minutes, to-wit:

32 "We the jury find for plaintiffs and assess their damages at \$11,000.00 and we apportion said sums as follows: To Maude Seale \$9,000.00; to F. H. Seale \$1,000.00; and to J. E. Seale \$1,000.

J. W. JORDAN, *Foreman.*"

It is therefore ordered, adjudged and decreed by the court that the plaintiffs, Maude Seale, F. H. Seale and J. E. Seale, do have and recover of and from the defendant, St. Louis, San Francisco & Texas Railway Company, a corporation, said sum of Eleven Thousand (\$11,000.00) Dollars, (apportioned as follows: To Maude Seale Nine Thousand (\$9,000.00) Dollars; to F. H. Seale One Thousand (\$1,000.00) Dollars; to J. E. Seale One Thousand (\$1,000.00) Dollars), with interest thereon from this date at the rate of 6% per annum, together with all costs of suit; for which let execution issue.

18311.

MAUDE SEALE et al.

vs.

ST. L., S. F. & T. RY. CO.

MAY 30TH, 1910.

Order Granting Def't Leave to File Amd. Motion for New Trial.

This day leave is hereby granted the defendant in the above styled cause to file its amended motion for a new trial herein.

In the 15th District Court, Grayson County, Texas.

No. 18311.

MAUDE SEALE et al.

vs.

ST. L., S. F. & T. RY. CO.

1st Amended Motion for a New Trial.

Filed 5/30/10.

Now comes the defendant and with leave of the court first had and obtained files this its first amended original motion for a new trial, and prays the court to set aside the verdict heretofore rendered against it, and to grant it a new trial herein for the following reasons:

33 I.

The court erred in overruling defendant's second special exception to plaintiff's petition, as follows:

"Because said petition does not show whether or not at the time said Seale was injured he was engaged in the handling of interstate commerce."

II.

The court erred in overruling defendant's third special exception to plaintiff's petition, as follows:

"Said petition does not show whether or not defendant, at the time it committed the acts complained of was engaged with respect thereto in the handling of interstate commerce."

III.

The court erred in the following part of the main charge to the jury:

"The undisputed evidence in this case shows that Memory T. Seale was at the time of his death in the employ of the defendant

company as yard clerk, and that he had just gone to work for said company in this capacity, but had worked for said company previously in another capacity."

IV.

The court erred in the following portion of its general charge to the jury:

"If you believe from the evidence that on the occasion in question the switch engine that ran over and killed deceased Memory T. Seale had been brought upon the track over which it was being operated at the time of the death of said Seale by the crew operating said engine without the bell on same being rung or the whistle sounded; and if you further believe from the evidence that said engine had been moved along said track by said crew without the ringing of said bell until it struck the said Seale; and if you further believe from the evidence that had said whistle or bell been sounded at the time said engine was brought upon said track or had said bell been sounded in the vicinity of where said Seale was killed the said Seale would have received notice of the movement of said engine and would not have attempted to cross in front of same on said occasion; and if you further believe from the evidence that the failure of the employés of defendant operating said engine at said time to sound said whistle and ring said bell when said engine entered upon said track or to sound said bell while said en-

34 gine was being operated upon said track in said vicinity, if any such failure you find there was, was negligence, as that term has been hereinbefore defined to you, and that said negligence was the proximate cause of said Memory T. Seale's being run over and killed by said engine; you will find for plaintiffs."

V.

The court erred in the following portion of Section 4 of its general charge to the jury:

"Or if you believe from the evidence that in the exercise of ordinary care for the safety of other employés that might be in the rightful use of defendant's said yards in the vicinity of where said Seale was run over and killed one of defendant's employés composing the switch crew in charge of said engine on said occasion should have ridden on the foot board in the rear of the tender of said engine, that is, on the foot board that was in front the way in which said engine was moving at said time; and if you further believe from the evidence that there was no such employé in said place on said occasion; and if you further believe from the evidence that if there had been one of said employés so situated he could have discovered said Seale in time, in the exercise of ordinary care, to have prevented the death of the said Seale; and if you further believe from the evidence that in the failure to have some one of said employés stationed on said foot board on said occasion, if any such failure you find there was, defendant was guilty of negligence and that such negligence, if any, was the proximate cause of said Seale's death, you will find for the plaintiffs."

VI.

The court erred in the following portion of Section No. 4 of its general charge to the jury:

"Again, the undisputed evidence shows that one Brewer was a member of the switch crew of said engine and that on said occasion he was riding on one of the footboards of said engine, so if you believe from the evidence that said Brewer saw the deceased Memory F. Seale just before he was run over by said engine; and if you further believe from the evidence that it reasonably appeared to said Brewer and he believed that said Seale would probably attempt to cross said track in front of said engine at such a time that he would probably be struck by said engine, and that said Brewer realized the perilous situation of said Seale in time, by the use of means he had at hand, to have avoided the said engine striking the said Seale; and if you further believe from the evidence that the said Brewer failed to use such care in the use of the means, if any, he had at hand to avoid said Seale's being struck by said engine as an ordinarily prudent person would have used under the same or similar circumstances; and if you further believe from the evidence that in such failure, if any you find there was, said Brewer was guilty of negligence, as that term has hereinbefore been defined, and that such negligence, if any, was the proximate cause of said Seale's death, then in any of these three events you will find for plaintiffs and assess their damages as hereinafter directed unless you should find for defendant under other instructions given you in charge.

VII

The court erred in Section No. 8 of its general charge to the jury, as follows:

"If under the foregoing instructions, you find that the plaintiffs, or any of them, are entitled to recover you will assess their damages at such sum as represents the present worth or value of the future pecuniary aid which you find and believe from the evidence the said Seale would have contributed to them had he lived; and if you find in favor of more than one of said plaintiffs you will apportion the amount so found among the plaintiffs for whom you have found in such sum as you may determine each is entitled to receive."

VIII.

The court erred in Section No. 9 of its general charge to the jury, as follows:

"If you find for plaintiffs the form of your verdict may be 'We, the jury, find for plaintiffs and assess their damages at \$—— (filling the blank with the amount you find) and we apportion said sum as follows', naming the amount and the party to which said sum is apportioned. If you find for defendant you will simply so state. Of course if you should find for only one of said plaintiffs

there would be no amount to apportion. Let your verdict be signed by your foreman whom you will select from your number when you retire."

IX.

The verdict of the jury is contrary to, and without sufficient evidence to support it in finding that the failure of defendant's employes operating said engine at said time to sound said whistle and to ring said bell when said engine entered upon said track, or to sound said bell as said engine was being operated upon said track in said vicinity was negligence, and that such negligence was the proximate cause of the death of deceased.

36

X.

The verdict of the jury is contrary to, and without sufficient evidence to support it in finding that if there had been one of defendant's employes situated upon the rear switchboard of said engine, that is, the footboard which was moving forward he could have discovered said Seale in time in the exercise of ordinary care to have prevented the death of said Seale, and that in failing to have some one of said employes stationed on said footboard on said occasion the defendant was guilty of negligence, and that such negligence was the proximate cause of said Seale's death.

XI.

The verdict of the jury is contrary to, and without sufficient evidence to support it in finding that said Brewer saw said deceased, and that it reasonably appeared to said Brewer, and he believed that said Seale would probably attempt to cross said track in front of said engine at such time as that he would probably be struck by said engine, and that said Brewer realized the perilous situation of said Seale in time to apply the use of the means he had at hand to have avoided the engine striking the said Seale, and that said Brewer failed to use such care of the use of the means he had at hand to avoid said Seale's being struck by said engine, as an ordinarily prudent person would have used under the same or similar circumstances and that such failure upon the part of said Brewer was negligence, and was the proximate cause of said Seale's death.

37

XII.

The verdict of the jury is contrary to, and without sufficient evidence to support it in finding that an ordinarily prudent person would have sounded said whistle or rung said bell at the time said engine entered upon said track on the occasion in question, or would have rung said bell at the time said engine was approaching, and in the vicinity where said Seale was killed.

XIII.

The verdict of the jury is contrary to, and without sufficient evidence to support it in finding that an ordinarily prudent person would have had some one of said employés on said footboard on said occasion.

XIV.

The verdict of the jury is contrary to and without sufficient evidence to support it in finding that the deceased, M. T. Seale, on the occasion in question was not going hurriedly across the railway yard of defendant, and that he did stop, look or listen for the approach of an engine as he attempted to cross said track, or that if he was going hurriedly across said railway yards and did not stop or look or listen for the approach of an engine as he attempted to cross said track he was not himself guilty of negligence.

XV.

The verdict of the jury is contrary to, and without sufficient evidence to support it in finding that the said Brewer when he saw the said Seale moving towards the track, on which the said engine was moving, realized that he (Seale) was in a perilous
38 position and that he would probably attempt to cross said track in front of said engine, or in finding that when said Brewer realized said Seale's perilous position he could, in the exercise of ordinary care, by the use of the means he had at hand, have avoided said Seale's being struck by said engine; or in finding that said Brewer on said occasion did not exercise ordinary care to use all the means, which he had at hand, to avoid said Seale's being struck.

XVI.

The verdict of the jury, as a whole, and in favor of each of the parties separately, is grossly excessive in amount in that one-half thereof would have amply compensated the plaintiffs, and each of them, for all of the loss sustained under the evidence.

XVI.

The judgment of the court in favor of the plaintiff, Maude Seale, is contrary to law, and to the evidence in this case in that the undisputed evidence shows that the deceased, for whose death the suit is brought, was, at the time of his death, engaged in interstate commerce and the right, if any, of said plaintiff, Maude Seale, to recover in this case is given and governed by the Act of Congress relating to Interstate Commerce and to the Liability of Common Carriers to their Employés, and no right of action is given for death to the wife of an employé killed while engaged in such commerce, but is given only to the personal representative of such deceased employé.

39

XVII.

The judgment of this court is contrary to law and to the evidence in this case in-s'-far as the same is in favor of the plaintiff, F. H. Seale, in that the undisputed evidence shows that the deceased, Memory T. Seale, on account of whose death this suit is brought, was at the time of his death engaged in interstate commerce, and the right, if any, of said plaintiff, F. H. Seale, to recover on account of said death is governed by the Act of Congress relating to Liability of Common Carriers to *its* Employés in Certain Cases, and no right of action is given by said Act to the parents of the deceased in cases where the deceased left surviving him a wife.

XVIII.

The judgment of the court is contrary to law and to the evidence in this case in-so-far as the same is in favor of the plaintiff, J. E. Seale, in that: 1. The undisputed evidence shows that at the time of the death of said Memory T. Seale, on account of whose death this action is brought, he was engaged in interstate commerce, and the right of said plaintiff to recover on account of his said death is governed by the Act of Congress relating to the Liability of Common Carrier to *its* Employés in Certain Cases, and by the provisions of said Act and of the law applicable to this case no right of action is given to the parent of the deceased in cases where said deceased left surviving him a wife, as said deceased in this case did. (2) The undisputed evidence shows that at the time of the death of said Memroy T. Seale, and at the time of this trial, said J. E. Seale was and now is a married woman, whose husband is a party to this suit.

40

XIX.

The court erred in refusing to give to the jury special charge No. 1 requested by defendant.

XX.

The court erred in refusing to give to the jury special charge No. 2 requested by defendant.

XXI.

The court erred in refusing to give to the jury special charge No. 3 requested by defendant.

XXII.

The court erred in refusing to give to the jury special charge No. 4 requested by defendant.

XXIII.

The court erred in refusing to give to the jury special charge No. 5 requested by defendant.

XXIV.

The court erred in refusing to give to the jury special charge No. 6 requested by defendant.

XXV.

The court erred in refusing to give to the jury special charge No. 7 requested by defendant.

XXVI.

The court erred in refusing to give to the jury special charge No. 8 requested by defendant.

XXVII.

The court erred in refusing to give to the jury special charge No. 9 requested by defendant.

XXVIII.

The court erred in refusing to give to the jury special charge No. 10 requested by defendant.

XXIX.

The court erred in refusing to give to the jury special charge No. 11 requested by defendant.

41 XXX.

The court erred in refusing to give to the jury special charge No. 12 requested by defendant.

XXXI.

The court erred in refusing to give to the jury special charge No. 13 requested by defendant.

XXXII.

The court erred in refusing to give to the jury special charge No. 14 requested by defendant.

XXXIII.

The court erred in refusing to give to the jury special charge No. 16 requested by defendant.

XXXIV.

The court erred in refusing to give to the jury special charge No. 17 requested by defendant.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Filed May 30, 1910. K. S. Loving, Clerk District Court.

183 11.

MAUDE SEALE et al.

v.

ST. L., S. F. & T. RY. CO.

Order Overruling Motion for New Trial.

MAY 30TH, 1910.

This day came on to be heard the amended motion of the defendant in the above styled cause for an order of court setting aside the judgment heretofore rendered against it and granting it a new trial herein; and the same being heard and considered, because it is the opinion of the court that said motion is not well taken, the same is hereby in all things overruled; to which action and ruling, the defendant in open court excepts and gives notice of appeal to our Court of Civil Appeals within and for the 5th. Supreme Judicial District of Texas.

42 It is ordered that 30 days after the adjournment of this term of this Court, be, and are hereby allowed said defendant in which to prepare and file its statement of facts and bills of exception herein.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE

vs.

ST. L., S. F. & T. RY. CO.

Defendant's Bill of Exceptions No. 1.

Filed 9/1/10.

Be it remembered that upon the trial of the above numbered and entitled cause, the plaintiff offered to read in evidence the following portion of the testimony of their witness, W. S. Holt given upon a former trial:

"It is the duty of the man following the engine to never leave the engine, but to stay close to the engine." In order to protect it in case of backing up he should be close to the engine."

Also the following portion of such testimony of said witness:

"When the engineer starts to back through the yard he should be on the foot board in the rear of the tender or tank," to each portion of which testimony the defendant severally objected at the time each was offered upon the ground that the same was an opinion and conclusion of the witness on a matter for the jury and upon which the witness was not qualified; which objections were by the court overruled and said testimony was read to the jury;

43 to which action of the court in overruling its objections, defendant then and there excepted, and now tenders this, its

bill of exceptions No. 1 and asks that the same be allowed, which is accordingly done.

I approve the foregoing bill of exception No. 1, with this qualification.

The witness Holt testified as follows:

"I worked out there (the North Sherman Yards of the defendant, in the switching department a little over a year I believe. I was acquainted with the duties of the man that followed the engine." I guess I was familiar with the duties of a switchman. I obtained information so as to become familiar with the duties of a switchman by being told by fellow switchmen and by more experienced men what the duties of a switchmans would be or what they are and by actual experience. By more experienced men I mean foremen, directing the work. The yard master has charge of the work in the switch yards; that is he is the chief man that controls the yards." (Steno. Rep., 2-3).

B. L. JONES,

Judge 15th Judicial District, Presiding.

Filed Sept. 13, 1910. K. S. Loving, Clerk Dist. Court, Grayson County, Texas.

In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE

vs.

ST. L., S. F. & T. RY. CO.

Defendant's Bill of Exceptions No. 2.

Filed 9/13/10.

Be it remembered that upon the trial of the above numbered and entitled cause the plaintiff offered to read in evidence the following portion of the deposition of L. A. Brewer:

44 "Inty. 22. If you have had experience as a switchman in seeing engines stopped by the application of air, state within what space, in your judgment, this engine could have been stopped by the application of the air in emergency, at that place and under the conditions, if it had been running three or four miles an hour? Within what space of time if running four or five miles an hour? Within what space if it had been running five or six miles an hour? Within what space if it had been running six or seven or eight miles an hour?"

Answer. I should think it could be stopped at seven or eight feet; at five or six four or five feet more; at six or seven it would have taken eighteen or twenty feet; and at seven or eight, twenty to twenty five feet."

To which defendant objected on the ground that the witness was

not shown to be qualified to give an estimate of the distance within which an engine could be stopped; that the answer involved merely the opinion and conclusion of the witness upon a matter for the jury, and that the same was hearsay; which objections were by the court overruled, and said question and answer thereto were read to the jury, to which action of the court in overruling its said objections the defendant then and there excepted, and now tenders this its bill of exceptions No. 2, and asks that the same be allowed, which is accordingly done.

45 I approved defendant's bill of exceptions No. 2, with the following qualification:

The witness testified as to his experience as follows: I am a switchman and am in the employ of the St. Louis, San Francisco & Texas Ry. Co., and at this time I reside in Sherman, Texas. As I have just stated, I am employed in the capacity of switchman and have been so employed for about two years at Sherman, Texas. I work in the day time now. I have had about ten years' experience as a railway switchman. I have worked for other companies besides the St. Louis, San Francisco & Texas Ry. Co. I have worked for the Galveston Wharf Co. and the M. K. & T. Ry. Co. I worked for the Galveston Wharf Co. about two years and for the M. K. & T. about five years and a half." (Steno. Rep. 13.)

And qualified his answer, which is objected to in this bill, as follows:

"I do not like to answer as to these matters, for it is only my estimate of it. I cannot undertake to say certainly." (Steno. Rep., 16.)

The witness also testified that he was engine foreman in charge of the switch crew that ran over and killed the deceased, Memory T. Seale. (Rec. 14.)

B. L. JONES,
Judge 15th Judicial District, Presiding.

Filed Sept. 13, 1910. K. S. Loving, Clerk Dist. Court, Grayson County, Texas.

46 In the District Court of Grayson County, Texas, 15th Judicial District.

No. 18311.

MAUDE SEALE

vs.

ST. L., S. F. & T. RY. CO.

Defendant's Bill of Exceptions No. 3.

Filed 9/13/10.

Be it remembered, that upon the trial of the above entitled and numbered cause, while plaintiff's witness, R. H. Peters was upon

the witness stand he was asked the following question by plaintiff's attorney:

"From your experience as a locomotive engineer, and operation of one, and observing the operation of it, are you prepared to say within what time, knowing the conditions, an engine could be stopped by an application of the air?"

To any answer to which question the defendant objected because the same would be too remote and speculative, an opinion and conclusion and the witness not qualified to testify as to the particular engine involved in this suit, not shown that he ever operated an engine in the defendant's yards, or an engine of the character involved in this suit, and not shown that witness had ever had any experience to enable him to say how quick the particular engine involved in this accident could have been stopped; that the evidence would be too uncertain, and would put a speculative matter before the jury that would be confusing, and not of sufficient definiteness to rise to the dignity of evidence, and would be irrelevant and immaterial, which objections were by the court overruled, and witness answered:

47 "Yes, if I knew the condition exactly," to which action of the court in overruling said objections defendant excepted whereupon plaintiff's attorney asked the further question:

"Now, suppose a switch engine properly equipped with air, going slowly up grade at the rate of five or six miles an hour, had the emergency brake applied, within what space could the engine be stopped? I will add a little to that; there was nothing attached to either end of the locomotive, that is, it was not hauling or pushing any load, and the engine was backing up while slightly up grade at the rate of five or six miles an hour; now, if the emergency brake had been applied, within what space or time would the engine have been brought to a stop?"

Whereupon defendant's attorney renewed its objections, as stated above, and added the additional objections that the question involved an opinion and conclusion of the witness upon certain facts which were not sufficiently stated; all of which objections were by the court overruled and the witness asked the question:

"Was the engine full of water and full of coal?" to which plaintiff's attorney stated:

"I do not know as to the condition of the tender as to water and coal."

The witness (was) then asked the question: "Was it a large wheel or a small wheel engine?" To which the plaintiff's attorney stated: "I could not tell as to that."

48 The witness then said: "Well that would have something to do with my opinion."

Plaintiff's attorney then said: "Well suppose you put your answer as to what it would be without reference to the coal, and the size of the wheel, the evidence doesn't show that."

To which answer as called for, the defendant renewed its objections, as above stated, whereupon the court asked the question:

"Do you expect to follow it up?"

And plaintiff's attorney answered, "Yes, sir."

The court then thereupon overruled defendant's objections and the witness answered:

"If it was a light load engine it would stop mighty quick. Did you say that it was going up grade?"

"PLAINTIFF'S ATTORNEY: Yes, slightly up grade."

"WITNESS: Working steam or rolling?"

"PLAINTIFF'S ATTORNEY: Working steam."

"WITNESS: Well I would say it would take any where from two to five or six feet in order to stop."

To which action of the court in overruling its said objections, defendant, each time upon such ruling being made, excepted and now tenders this its bill of exceptions No. 3, and asks that the same be allowed, which is accordingly done.

I approve defendant's bill of exceptions No. 3, with the following qualifications:

The witness testified as to his qualification, as an expert as follows:

49 "I have been in the railroad service, for the M. K. & T. road on the south end. I was in their employ from 1890 to 1906. I was roundhouse wiper up to running a locomotive. I have been an engineer. I ran a locomotive as locomotive engineer about five years for the M. K. & T. I am familiar with the operation of locomotives and applications of air to them to stop them."

The plaintiff's counsel did follow up this testimony by showing the size, character and amount of coal and water upon the engine, by other witnesses, but the only hypothetical question upon said matter propounded to this witness were those shown in this bill.

B. L. JONES,

Judge of the 15th Judicial District, Presiding.

Filed Sept. 13, 1910. K. S. Loving, Clerk Dist. Court, Grayson County, Texas.

In the District Court of Grayson County, Texas, 15th Judicial District.

No. 18311.

MAUDE SEALE

vs.

ST. L., S. F. & T. RY. CO.

Defendant's Bill of Exceptions No. 4.

Filed 9/13/10.

Be it remembered, that upon the trial of the above numbered and entitled cause, while plaintiff's witness, T. S. Henson was upon the stand he was asked the following question by plaintiff's attorney:

"Now, if that engine is properly equipped with air, in working order, running five or six miles an hour, the engine being alone, that is, not hauling or pushing any load, the track up
50 grade, if the air had been turned on in the emergency, how long would it take to stop the engine? What space would it go, in other words, in stopping?"

To any answer to which defendant objected because the same would be too remote and speculative, an opinion and conclusion, the witness not qualified to testify as to the particular engine involved in this suit, not shown that he ever operated an engine in defendant's yards, or an engine of the character involved in this suit, and not shown that witness had ever had any experience to enable him to say how quickly the particular engine involved in this accident could have stopped; that the evidence would be too uncertain and would put a speculative matter before the jury that would be confusing and not of sufficient definiteness to rise to the dignity of the evidence and would be irrelevant and immaterial; and upon further ground that the question called for an opinion and conclusion of the witness upon said facts which were not sufficiently stated, all of which objections were by the court overruled and the witness was permitted to answer to the jury:

"It would stop in a foot or two."

To which action of the court in overruling said objections, and permitting said answer, the defendant then and there excepted and now tenders this its bill of exceptions No. 4, and asks that the same be allowed, which is accordingly done.

I approve defendant's bill of exceptions No. 4, with the following qualifications:

"The witness T. S. Henson testified as to his experience as a railroad man as follows:

51 "I have worked for the St. Louis, San Francisco & Texas Railway Company. I worked for them last year, 1909. I went to work on the 14th of January I think. I quit the 15th of June, 1909, according to my best recollection. I was not discharged; just got in bad health and couldn't have my health and had to quit. I was a boiler washer at the round house in the north Sherman yards. I was a day hand and worked at night and day both. I have had other railroad experience. I was engineer on the Rock Island at Shawnee, Okla. I ran a switch engine about eighteen months. I have had other railroad experience as a railroad man. I fired for the Katy at Denison. I fired for the Katy at Denison about three months I think, three or four months, in the yards." (Steno. Rec. 33.)

He further testified as to his knowledge of the particular engine that ran over and killed deceased, as follows:

"I knew the engine that ran over Seale. I had seen it in the yards there. I had seen the engine often. I knew the engine they used there at night. The number of it is 3670. It was a switch engine. It was a very good engine. It had large wheels. It had been a road engine in time. It was a pretty good engine. I am

familiar with the yards there. It is up grade a little up this main lead track to the north of the office here." (Steno. Rec. 34.)

B. L. JONES,
Judge of the 15th Judicial District, Presiding.

Filed Sept. 13, 1910. K. S. Loving, Clerk Dist. Court, Grayson County, Texas.

52 In the District Court of Grayson County, Texas, 15th Judicial District.

MAUDE SEALE

vs.

St. L., S. F. & T. Ry. Co.

Defendant's Bill of Exceptions No. 5.

Filed 9/13/10.

Be it remembered, that upon the trial of the above numbered and entitled cause, while plaintiff's witness, H. S. Cowell, was upon the stand he was asked the following question by plaintiff's attorney:

"Suppose a switch engine going up a slight grade with the tender in front, that is, backing up a slight grade, going at the rate of five or six miles per hour, having nothing attached to it, that is not hauling any cars and not pushing any cars, in what distance could the engine be stopped by an immediate application of the air, that is an emergency application? Assuming that the braking apparatus is in good condition what distance, if any, would it travel in stopping?"

To any answer to which question defendant objected because the same would be too general, indefinite and vague, not applicable to this cause, assuming that all engines are constructed alike, and can be stopped in the same distance, which is not shown to be a fact, too remote, and not sufficiently connected with the particular engine in this case to rise to the dignity of the proof, an opinion and conclusion of the witness: which objections were by the court overruled and the witness answered:

"It would stop at once, I do not think it would travel two feet,"
to which action of the court in overruling said objections defendant then and there excepted and now tenders this its
53 bill of exceptions No. 5, and asks that the same be allowed, which is accordingly done.

I approve defendant's bill of exceptions No. 5 with the following qualifications:

The witness testified as to his railroad experience, as follows:

"My occupation in life has been railroad conductor freight conductor. I have had experience as brakeman and conductor, over a period of twenty-five years. I have worked for the Missouri Pacific as brakeman and conductor. That was in 1882. I have worked

for the Cincinnati Southern. That was in 1889. I was running a passenger train then. I was conductor on it. I came to Denison in 1892 to the M. K. & T. I was employed by the Katy there on the north end as brakeman. I have worked as conductor for the Katy out of Denison. I broke about nine months and have been running trains as conductor out of there twelve years.

I understand the air in braking apparatus as used on locomotives and trains; understand how it works." (Steno. Rec., 40).

B. L. JONES,

Judge 15th Judicial District, Presiding.

Filed Sept. 13, 1910, K. S. Loving, Clerk Dist. Court, Grayson County, Texas.

54 In the District Court of Grayson County, Texas, 15th Judicial District.

No. 18311.

MAUDE SEALE

vs.

ST. L., S. F. & T. RY. CO.

Defendant's Bill of Exceptions No. 6.

Filed 9/13/10.

Be it remembered, that upon the trial of the above numbered and entitled cause, while defendant's witness, J. P. Whiting, was upon the stand, he was asked the following question by defendant's attorney:

"I will ask you to state what the understanding and custom and way of doing the work in those yards is; as to whether or not it is usual and customary for the engine man to keep a lookout for people on the ground, or for people on the ground to keep a lookout and watch for the engine?"

To any answer to such question plaintiff's counsel objected as leading, calling for a conclusion and opinion instead of stating the facts; furthermore that if there were any rules he would want to know whether they were in writing or not, and because the question allowed the witness to draw a conclusion which the jury could draw; didn't call for expert testimony, but called for an opinion and conclusion on a matter that wasn't expert; that the witness was an expert, and if any expert testimony was wanted the witness could testify; that the witness had already testified as to how he did his work there and now as to what his opinion would be whether he should keep a lookout for other people or other people should keep

55 a lookout for him couldn't be anything but a conclusion and opinion, which objections were by the court sustained, and the witness was not permitted to answer the question, to which action of the court in sustaining said objections the defendant then

and there excepted, and now tenders this its bill of exceptions No. 6, and asks that the same be allowed which is accordingly done.

I approve defendant's bill of exceptions No. 6, with the following qualifications:

The witness testified as follows:

I don't think there are any written rules with reference to whether the engine men kept a lookout for people on the ground or people on the ground keep a lookout for the engine. (Steno. Rep. 58.)

It is not the duty of the engineer and fireman to look out all the time. I don't keep a look out in front of my engine the way it is going all the time. It is not my duty to do it." (Steno. Rec. 61.)

B. L. JONES,
Judge 15th Judicial District, Presiding.

Filed Sept. 13, 1910, K. S. Loving, Clerk Dist. Court, Grayson County, Texas.

In the District Court of Grayson County, Texas, 15th Judicial District.

No. 18311.

MAUDE SEALE

vs.

ST. L., S. F. & T. RY. CO.

Defendant's Bill of Exceptions No. 7.

Filed 9/13/10.

Be it remembered, that on the trial of the above numbered and entitled cause, while defendant's witness, J. W. Hartley was
56 upon the stand, he was asked the following question by defendant's attorney:

"I will ask you whether or not in doing the switching in those yards, in the way it is usually and customarily done, the man on the engine, or the engine men, are required to keep a lookout for people on the ground in order to protect them, or the people on the ground to keep a lookout for the switch engine in order to protect themselves."

To any answer to which question plaintiff's attorney objected that the same was irrelevant and immaterial, hearsay and called for an opinion and conclusion of the witness, asking for expert testimony when expert testimony was not necessary; the jury could draw its own conclusion as well as the witness, and that the matter is argumentative; which objections were by the court sustained. To which action of the court in sustaining said objection defendant then and there excepted. Whereupon plaintiff's counsel stated:

"I want to qualify my objection with the permission of the court, if they have any written or printed rules, we might not object to

that, but just for the witness to give his opinion from the way the business is done, as to whose business it is, why we do object."

Whereupon defendant's attorney asked the witness:

"Do you know of any written rules regarding that?" To which the witness answered:

"No, never heard of any." Thereupon defendant's counsel stated:

57 "Well, the question was directed to the usual and customary way of doing the work."

To which plaintiff's attorney replied:

"We are not objecting to the customary way of doing the work."

The defendant's attorney: "We stand on the question as it is put."

Said objections were sustained, and the witness was not permitted to answer said question; to which action of the court in refusing to permit the witness to answer said question, this defendant then and there excepted and now tenders this its bill of exceptions No. 7, and asks that the same be allowed which is accordingly done.

I approved defendant's bill of exceptions No. 7, with the following qualifications:

The witness testified as follows:

"They have no written rules with reference to the enginememen being required to keep a lookout for people on the ground in doing switching in those yards or the people on the ground being required to keep a lookout for the switch engine in order to protect themselves. I never heard of any. (Steno. Rec. 72.)

The witness further testified:

"I did not see any person or anything to indicate that there was anything on the track or approaching the track at the time of the accident or just before it at any time. I was looking ahead. I was not doing anything else; no work about the engine. That is all I was doing. (Steno. Rec., 69.)

B. L. JONES,

Judge 15th Judicial District, Presiding.

Filed Sept. 13, 1910, K. S. Loving, Clerk Dist. Court, Grayson County, Texas.

58 In the District Court of Grayson County, Texas, 15th Judicial District.

No. 18311.

MAUDE SEALE

vs.

ST. L., S. F. & T. RY. CO.

Defendant's Bill of Exceptions No. 8.

Filed 9/13/10.

Be it remembered, that upon the trial of the above numbered and entitled cause, while plaintiff's witness, Thoedore Shope, was upon

the stand, he was asked the following question by plaintiff's counsel:

"Suppose a switch engine equipped with three sets of wheels all of equal size, known as forty-four inch wheels three on each side of the engine, the engine supposed to be a seventy or eighty ton engine; it has about two tons of coal in the tank and 2500 gallons of water, going slightly up grade, not pulling or pushing any load, running five or six miles an hour, properly equipped with air, and the air in good working order and the brakes in good working order; within what space could the engine be stopped by the application of the emergency brake?"

To any answer to which question defendant objected as too general, remote and indefinite and not confined to the engine involved in this case, that the witness was not qualified to testify within what distance this particular engine could be stopped:

That it was not shown that the witness ever operated an engine in defendant's yards, where this accident happened, or ever operated an engine of the character involved in this suit, and had not had any experience that entitled him to say within what distance, this particular engine could be stopped; that the question called
59 for an opinion and conclusion of the witness, upon facts not sufficiently stated, which objections were by the court overruled, and the witness was permitted to answer:

"With automatic brake it would stop just as quick as you could put it on."

To which action of the court in overruling said objections and in permitting said answer, defendant then and there excepted and now tenders this its bill of exceptions No. 8 and asks that the same be allowed, which is accordingly done.

I approve the foregoing bill of exceptions No. 8, of the defendant, with the following qualifications:

The witness testified as to his qualifications as follows:

"I have had about twenty-five years of railroad experience. I have done all kinds of railroading. I fired four years, ran an engine about ten years as engineer. I have switched some and worked as brakeman. From my experience as a railroad man I can estimate with accuracy the distance that locomotives equipped with air brakes properly can be stopped going at certain speed on certain grades."
(Steno. Rec. 106-107.)

B. L. JONES,
Judge of the 15th Judicial District, Presiding.

Filed Sept. 13, 1910. K. S. Loving, Clerk Dist. Court, Grayson County, Texas.

60 In the District Court of Grayson County, Texas, 15th Judicial District.

No. 18311.

MAUDE SEALE

vs.

ST. L., S. F. & T. RY. CO.

Defendant's Bill of Exceptions No. 9.

Filed 9/13/10.

Be it remembered, that on the trial of the above numbered and entitled cause, while plaintiff's witness, J. M. Cain, was upon the witness stand he was asked the following question by plaintiff's attorney:

"Now suppose there is a switch engine, supposed to be seventy or eighty ton switch engine, equipped with wheels of the same size, three on each side of the engine, known as forty-four inch wheels; it has about two tons of coal in the tank, and about 2500 gallons of water, going slightly up grade at the rate of five or six miles an hour, not pushing or pulling any cars, is properly equipped with air and emergency brake, brake being in good working order, within what space could the engine be stopped by an application of the emergency brake?"

To any answer to which question defendant objected because it was too general, remote and indefinite and not confined to the engine involved in this case, and that the witness was not qualified to testify within what distance this particular engine could be stopped; That it was not shown that the witness ever operated an engine in defendant's yards, where this accident happened, or ever operated an engine of the character involved in this suit, and had not any experience that enabled him to say within what distance this particular engine could be stopped; that the question called for an opinion and conclusion of the witness upon facts not sufficiently stated; which objections were by the court overruled and the witness permitted to answer to the jury:

61 "If the momentum of the engine was sufficient to slide the wheels, the friction on the rails would have a good deal to do with it. On a dry rail, at that rate of speed it wouldn't slide the wheel, I don't think, over three or four inches."

To which action of the court in overruling its said objections, and in permitting said answer, defendant then and there excepted and now tenders this its bill of exceptions No. 9, and asks that the same be allowed, which is accordingly done.

I approve the foregoing bill of exceptions No. 9, of defendant with the following qualification:

The witness testified as to his qualification as follows:

"I live at Denison and have lived there about twenty-two years.

I have had some railroad experience in the locomotive department. I was an engineer about five or six years for the M. K. & T. I did some other kind of railroad work before I was an engineer. I worked a couple of years around the roundhouse. I have had experience in stopping trains and engines by the use of the air emergency brakes. From my experience I can estimate with accuracy the time it would take to stop an engine or train with the application of the emergency brake if I understand the condition and surroundings" (Steno. Rec., 107-108).

B. L. JONES,

Judge 15th Judicial District, Presiding.

Filed Sept. 13, 1910, K. S. Loving, Clerk Dist. Court, Grayson County, Texas.

In the 15th District Court, Grayson County, Texas.

No. 18311.

MAUDE SEALE

vs.

ST. L., & S. F. — RY. CO.

Defendant's Assignment of Errors.

Filed 9/13/10.

Now comes the defendant and assigns the following as errors committed to its prejudice upon the trial of the above cause.

I.

The court erred in overruling defendant's second special exception to plaintiff's petition, as follows:

"Because the said petition does not show whether or not at the time said Seale was injured he was engaged in the handling of interstate commerce."

II.

The court erred in overruling defendant's third special exception to plaintiff's petition, as follows:

"Said petition does not show whether or not defendant at the time it committed the acts complained of was engaged with respect thereto in the handling of interstate commerce."

III.

The court erred in the following part of the main charge to the jury:

63

"The undisputed evidence in this case shows that Memory T. Seale was at the time of his death in the employ of the

defendant company as yard clerk, and that he had just gone to work for said company in this capacity, but had worked for said company previously in another capacity."

IV.

The court erred in the following portion of its general charge to the jury:

"If you believe from the evidence that on the occasion in question the switch engine that ran over and killed deceased Memory T. Seale had been brought upon the track over which it was being operated at the time of the death of the said Seale by the crew operating said engine without the bell on same being rung or the whistle sounded; and if you further believe from the evidence that said engine had been moved along said track by said crew without the ringing of said bell until it struck the said Seale; and if you further believe from the evidence that had said whistle or bell been sounded at the time said engine was brought upon said track or had said bell been sounded in the vicinity of where the said Seale was killed the said Seale would have received notice of the movement of said engine and would not have attempted to cross in front of same on said occasion; and if you further believe from the evidence that the failure of the employés of the defendant operating said engine at said time to sound said whistle and ring said bell when said engine entered upon said track or to sound said bell while said engine was being operated upon said track in said vicinity, 64 if any such failure you find there was, was negligence, as that term has been hereinbefore defined to you, and that said negligence was the proximate cause of said Memory T. Seale's being run over and killed by said engine, you will find for plaintiffs."

V.

The court erred in the following portion of Section 4 of its general charge to the jury:

"Or if you believe from the evidence that in the exercise of ordinary care for the safety of other employés that might be in the rightful use of defendant's said yards in the vicinity of where said Seale was run over and killed one of defendant's employés composing the switch crew in charge of said engine on said occasion should have ridden on the foot board in the rear of the tender of said engine that is, on the foot board that was in front the way in which said engine was moving at said time; and if you further believe from the evidence that there was no such employé in said place on said occasion; and if you further believe from the evidence that if there had been one of said employés so situated he could have discovered said Seale in time, in the exercise of ordinary care, to have prevented the death of the said Seale; and if you further believe from the evidence that in the failure to have some one of said employés stationed on said footboard on said occasion, if any such failure you find there was, defendant was guilty of negligence and

that such negligence, if any, was the proximate cause of said Seale's death, you will find for plaintiffs."

65

VI.

The court erred in the following portion of Section No. 4, of its general charge to the jury:

"Again the undisputed evidence shows that one Brewer was a member of the switch crew of said engine and that on said occasion he was riding on one of the footboards of said engine, so if you believe from the evidence that said Brewer saw the deceased Memory T. Seale just before he was run over by said engine; and if you further believe from the evidence that it reasonably appeared to said Brewer and he believed that said Seale would probably attempt to cross said track in front of said engine at such time that he would probably be struck by said engine, and that said Brewer realized the perilous situation of said Seale in time, by the use of the means he had at hand, to have avoided the said engine striking the said Seale; and if you further believe from the evidence that the said Brewer failed to use such care in the use of the means, if any, he had at hand to avoid said Seale's being struck by said engine as an ordinarily prudent person would have used under the same or similar circumstances; and if you further believe from the evidence that in such failure if any you find there was, said Brewer was guilty of negligence, as that term has hereinbefore been defined to you, and that such negligence, if any, was the proximate cause of said Seale's death, then in any of these three events you will find for plaintiffs and assess their damages as hereinafter directed unless you should find for defendant under other instructions given you in charge."

66

VII.

The court erred in Section 8 of its general charge to the jury, as follows:

"If under the foregoing instructions, you find that the plaintiffs, or any of them, are entitled to recover you will assess their damages at such sum as represents the present worth or value of the future pecuniary aid which you find and believe from the evidence the said Seale would have contributed to them had he lived; and if you find in favor of more than one of said plaintiffs you will apportion the amount so found among the plaintiffs for whom you have found in such sum as you may determine each is entitled to receive."

VIII.

The court erred in Section No. 9 of its general charge to the jury, as follows:

"If you find for plaintiffs the form of your verdict may be, We, the jury find for plaintiffs and assess their damages at \$—— (filling the blank with the amount you find) and we apportion said sum as follows, naming the amount and the party to which said sum is

apportioned. If you find for defendant you will simply so state. Of course if you should find for only one of said plaintiffs there would be no amount to apportion. Let your verdict be signed by your foreman whom you will select from your number when you retire."

IX.

The verdict of the jury is contrary to and without sufficient evidence to support it in finding that the failure of defendant's employes operating said engine at said time to sound said whistle and to ring said bell when said engine entered upon said track, or to sound said bell *or* said engine was being operated upon said track in said vicinity was negligence, and that such negligence was the proximate cause of the death of the deceased.

X.

The verdict of the jury is contrary to, and without sufficient evidence to support it in finding that if there had been one of defendant's employes situated upon the rear switchboard of said engine, that is, the footboard which was moving forward he could have discovered said Seale in time in the exercise of ordinary care to have prevented the death of said Seale, and that in failing to have some one of said employes stationed on said footboard on said occasion the defendant was guilty of negligence, and that such negligence was the proximate cause of said Seale's death.

XI.

The verdict of the jury is contrary to, and without sufficient evidence to support it in finding that said Brewer saw said deceased, and that it reasonably appeared to said Brewer, and he believed that said Seale would probably attempt — said track in front of said engine at such time as that he would probably be struck by said engine, and that said Brewer realized the perilous situation of said Seale in time to apply the use of the means he had at hand to have avoided the engine striking the said Seale, and that said Brewer failed to use such care of the use of the means he had at hand to avoid said Seale's being struck by said engine as an ordinarily prudent person would have used under the same or similar circumstances and that such failure upon the part of said Brewer was negligence, and was the proximate cause of said Seale's death.

XII.

The verdict of the jury is contrary to and without sufficient evidence to support it in finding that an ordinarily prudent person would have sounded said whistle or rung said bell at the time said engine entered upon said track on the occasion in question, or would have rung said bell at the time said engine was approaching, and in the vicinity where said Seale was killed.

XIII.

The verdict of the jury is contrary to, and without sufficient evidence to support it in finding that an ordinarily prudent person would have had some one of said employes to have ridden on said footboard on said occasion.

XIV.

The verdict of the jury is contrary to and without sufficient evidence to support it in finding that the deceased M. T. Seale, on the occasion in question was not going hurriedly across the railway yard of defendant, and that he did stop, look or listen for the approach of an engine as he attempted to cross said track, or that if he was going hurriedly across said railway yards and did not stop or look or listen for the approach of an engine as he attempted to cross said track he was not himself guilty of negligence.

XV.

The verdict of the jury is contrary to and without sufficient evidence to support it in finding that the said Brewer when he saw the said Seale moving towards the track on which the said engine was moving, realized that he (Seale) was in a perilous position and that he would probably attempt to cross said track in front of said engine, or in finding that when said Brewer realized said Seale's perilous position he could, in the exercise of ordinary care, by the use of the means he had at hand, have avoided said Seale's being struck by said engine; or in finding that said Brewer on said occasion did not exercise ordinary care to use all the means, which he had at hand, to avoid said Seale being struck by said engine; or in finding that said Brewer on said occasion did not exercise ordinary care to use all the means, which he had at hand, to avoid said Seale's being struck.

XVI.

The verdict of the jury as a whole, and in favor of each of the parties separately, is grossly excessive in amount in that half thereof would have amply compensated the plaintiffs and each of them, for all of the loss sustained under the evidence.

XVI½.

The judgment of the court in favor of plaintiff, Maude Seale, is contrary to law, and to the evidence in this case, in that the undisputed evidence shows that the deceased, for whose death the suit is brought, was, at the time of his death, engaged in interstate commerce and the right of said plaintiff, Maude Seale, to recover is given by the Act of Congress relating to Interstate Commerce and to the Liability of Common Carriers to their employes, and no right of action is given for the death to the wife of an employe killed while engaged in such commerce, but is given only to the personal representatives of such deceased employe.

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XVII.

The judgment of this court is contrary to law and to the evidence in this case in so far as the same is in favor of the plaintiff, F. H. Seale, in that the undisputed evidence shows that the deceased Memory T. Seale, on account of whose death this suit is brought, was at the time of his death engaged in interstate commerce, and the right of said plaintiff, F. H. Seale, to recover on account of said death is governed by the Act of Congress relating to Liability of Common Carriers to *its* Employés in certain cases, and no right of action is given by said act to the parents of the deceased in case where the deceased left surviving him a wife.

XVIII.

The judgment of the court is contrary to law and to the evidence in this case in-so-far as the same is in favor of plaintiff, J. E. Seale, in that (1) the undisputed evidence shows that at the time of the death of said Memory T. Seale, on account of whose death this action is brought, he was engaged in interstate commerce, and the right of said plaintiff to recover on account of said death is governed by the Act of Congress Relating to the Liability of Common Carriers to *its* Employés in Certain Cases, and by the provisions of said Act and of the law applicable to this case no right of action is given to the parent of the deceased in cases where said deceased left surviving him a wife, as said deceased in this case did. (2) The undisputed evidence shows that at the time of the death of said Memory T. Seale and at the time of this trial, said J. E. Seale was and is a married woman, whose husband is a party to this suit.

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XIX.

The court erred in refusing to give to the jury special charge No. 1, requested by the defendant.

XX.

The court erred in refusing to give to the jury special charge No. 2 requested by defendant.

XXI.

The court erred in refusing to give to the jury special charge No. 3 requested by defendant.

XXII.

The court erred in refusing to give to the jury special charge No. 4 requested by defendant.

XXIII.

The court erred in refusing to give to the jury special charge No. 5 requested by defendant.

XXIV.

The court erred in refusing to give to the jury special charge No. 6, requested by defendant.

XXV.

The court erred in refusing to give to the jury special charge No. 7, requested by defendant.

XXVI.

The court erred in refusing to give to the jury special charge No. 8 requested by defendant.

XXVII.

The court erred in refusing to give to the jury special charge No. 9, requested by defendant.

XXVIII.

The court erred in refusing to give to the jury special charge No. 10, requested by the defendant.

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XXIX.

The court erred in refusing to give to the jury special charge No. 11, requested by defendant.

XXX.

The court erred in refusing to give to the jury special charge No. 12, requested by defendant.

XXXI.

The court erred in refusing to give to the jury special charge No. 13, requested by defendant.

XXXII.

The court erred in refusing to give to the jury special charge No. 14 requested by the defendant.

XXXIII.

The court erred in refusing to give to the jury special charge No. 16, requested by defendant.

XXXIV.

The court erred in refusing to give to the jury special charge No. 17, requested by defendant.

XXXV.

The court erred in admitting the testimony of the witness W. S. Holt over defendant's objections as shown by defendant's bill of exceptions No. 1.

XXXVI.

The court erred in admitting over defendant's objections the deposition of the witness, L. A. Brewer, as shown by defendant's bill of exceptions No. Two.

XXXVII.

The court erred in admitting over defendant's objections, the testimony of the witness, R. H. Peters, as shown by defendant's bill of exceptions No. Three.

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XXXVIII.

The court erred in admitting, over defendant's objections the testimony of the witness T. S. Henson, as shown by defendant's bill of exceptions No. Four.

XXXIX.

The court erred in admitting over defendant's objections, the testimony of the witness H. S. Cowell, as shown by defendant's bill of exceptions No. Five.

XXXX.

The court erred in excluding upon plaintiff's objections thereto, the testimony of the witness J. P. Whiting, as shown by defendant's bill of exceptions No. Six.

XXXXI.

The court erred in excluding upon plaintiff's objections thereto, the testimony of the witness J. W. Hartley, as shown by defendant's bill of exceptions No. Seven.

XXXXII.

The court erred in admitting over defendant's objections thereto, the testimony of the witness Theodore Shope, as shown by defendant's bill of exceptions No. Eight.

XXXXIII.

The court erred in admitting, over defendant's objections thereto, the testimony of the witness, J. M. Cain, as shown by defendant's bill of exceptions No. Nine.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Filed Sept. 13, 1910. K. S. Loving, Clerk Dist. Court, Grayson County, Texas.

Supersedeas Appeal Bond.

Filed 6/18/10.

Whereas in a certain cause No. 18311 then pending in the District Court of Grayson County, Texas, wherein Maude Seale, F. H. Seale and J. E. Seale are plaintiffs and the St. Louis, San Francisco & Texas Railway Company is defendant, the said Maude Seale, F. H. Seale and J. E. Seale, on the 12th day of May, 1910, recovered a judgment against the said St. Louis, San Francisco & Texas Railway Company, in substance as follows: Judgment in favor of plaintiffs and each of them against the defendant, St. Louis, San Francisco & Texas Railway Company, and their damages assessed in the aggregate sum of Eleven Thousand (\$11,000.00)—and No/100 Dollars, distributed among the said plaintiffs in the following amounts, to-wit: Nine Thousand (\$9,000.00)—and No/100 Dollars in favor of said Maude Seale; One Thousand (\$1,000.00)—and No/100 Dollars in favor of said F. H. Seale and One Thousand (\$1,000.00) and No/100 Dollars in favor of said J. E. Seale, together with 6% interest per annum thereon from date until paid, for all of which it was ordered that execution may issue.

And, whereas, the said St. Louis, San Francisco & Texas Railway Company desires to appeal from said judgment, and to suspend the execution of same pending such appeal, to do which the giving of a supersedeas bond is required.

Now, therefore, we, St. Louis, San Francisco & Texas Railway Company as principal, and J. G. Waples, and Wm. G. Newby, as sureties, do hereby acknowledge ourselves bound to pay to Maude

75 Seale, F. H. Seale and J. E. Seale, the sum of Thirty Thousand (\$30,000.00) and No/100 Dollars, conditioned that such appellant shall prosecute its appeal with effect and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment sentence or decree, and pay all cash damages as said courts may award against it.

Witness our hands this 2nd day of June, A. D. 1910.

ST. LOUIS, SAN FRANCISCO & TEXAS
RAILWAY COMPANY,

By HEAD, DILLARD, SMITH & HEAD,

Its Attorneys.

J. G. WAPLES,
WM. G. NEWBY,
Sureties.

Approved and filed June 18, 1910. K. S. Loving, Clerk District Court, Grayson County, Texas.

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Bill of Costs.

Clerk's Cost.

	Pl'tff.	Def't.
Docketing20	
Entering Appearances45	.15
Filing Papers	4.50	7.05
Issuing Citation	1.25	
Entering Orders	6.00	5.25
Continuances30	.30
Issuing Subpœnas	1.50	.50
Extra Names in Subpœnas	1.95	1.20
Commissions75
Taking Bond		1.50
Swearing Jury	2.10	
Swearing Witnesses	2.10	2.10
Affidavits and Seal	9.50	
Judgment	1.00	
Taxing Cost25
Certificates		1.50
Recording Returns50	
Transcript		41.00
Total	31.25	61.85

Sheriff's Cost.

Serving Citation75	
Summoning Witnesses	8.50	3.50
Mileage (Sum. Wit.)	4.80	.30
Jury Fee50	
Total	14.55	3.80

Recapitulation.

Clerk's Cost	31.25	61.85
Sheriff's Cost	14.55	3.85
Jury Fee	5.00	
Witness' Costs	65.62	
Notary Costs	5.50	7.50
Stenographer Fee	3.00	
Sam Davis (Statement of Facts)		59.60
Total	125.02	132.75

Plaintiff's Cost	125.02
Defendant's Cost	132.75

Total Cost of Suit..... \$257.77

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District Clerk's Certificate.

STATE OF TEXAS,
County of Grayson:

I, K. S. Loving, Clerk of the District Court of Grayson County, Texas, do hereby certify that the above and foregoing 82 pages of typewritten matter is a true and correct copy of and constitutes a complete transcript of all the proceedings had in cause No. 18311, Maude Seale et al. vs. St. L. S. F. & T. Ry. Co., as the same now appear on file and of record in my office.

Given under my hand and the seal of said Court in the City of Sherman, this the 14th day of Sept. 1910.

[SEAL.] K. S. LOVING,
Clerk of the District Court of Grayson
County, Texas.

Filed in the Court of Appeals the 16th day of September, 1910.
Geo. W. Blair, Clerk.

78 Tried in the 15th District Court of Grayson County, Texas,
April Term, 1910.

No. 18311.

MAUDE SEALE et al.
vs.
ST. L., S. F. & TEX. RY. CO.

Statement of Facts.

For Plaintiffs: J. H. Wood, J. P. Haven.
For Defendant: C. H. Smith, Hayden W. Head.

Testimony of W. S. Holt, Read by Agreement from Record of Former Trial.

Direct examination by Judge Wood:

My name is W. S. Holt, Jr. I am a son of W. S. Holt down near Howe. My residence, you might say, is in Sherman at present, but I am temporarily at Hoffman, Oklahoma.

I have worked for the St. Louis, San Francisco & Texas Ry. Co. I worked for them at Sherman in the capacity of yard clerk and switchman. As switchman I performed my duties in the north yards at Sherman.

I remember the night M. T. Seale was killed in those yards. I don't remember the date. I remember the occasion of his being killed. I was in the yards that night. He was killed about 8:30 o'clock I believe. He was employed as yard

erk at the time he was killed. This was his first night in that employment understand. The night he was killed was his first night in that employment. I was engaged as a switchman that night. The switch crew was composed of Brewer, engine foreman; Will Pelly, a helper; Sisk, a helper; and myself. Hitting was the engineer and Hartley was fireman. That was what was known as the night switch crew. We went on to work seven o'clock at night and went off at six in the morning. In operating the switch engine the foreman directs the movements and he is supposed to know where every car goes and he picks out certain tracks for certain cars to go and he cuts the cars off himself and the two field helpers are supposed to ride the cars and the other man is supposed to line the switches. In fact the foreman directs the work of the engine; all the work that is done. The foreman was Brewer. Sisk followed the engine. I was called a field man. Pelly was a field man also. Then there was the engineer and fireman. I worked out there in the switching department a little over a year I believe. I was acquainted with the duties of the man that followed the engine." It is the duty of the man following the engine to never leave the engine, but to stay close to the engine in order to protect it in case of backing up: He stays close to the engine and when it begins backing up steps on the rear footboard and rides the engine backward in order to protect the switch engine against running through closed switches and protect it from being cornered or run into by other engines.

Q. Well, then, he is there as a lookout is he?

A. Well, yes, you might say as a lookout.

0 When the engine starts to back through the yards he should be on the footboard in the rear of the tender or tank, and that would put him in front the way the engine was going when it was backing. I worked out there about a year as a switchman. I guess I was familiar with the duties of a switchman. I obtained information so as to become familiar with the duties of a switchman by being told by fellow switchmen and by more experienced men what the duties of a switchman should be or what they are and by actual experience. By more experienced men I mean foremen, directing the work. The yard master has charge of the work in the switch yards; that is, he is the chief man that controls the yards.

I was close to the scene at the time that Seale was killed. I was about thirty feet to his left I believe. The engine was headed south. The tender was north. We had thrown some cars in on a sidetrack west of the little office in the west yards. We had thrown five cars on there. I was on those cars. I rode them in there to take them to their proper place and set the brakes on them. They were kicked on to the sidetrack from the north here. The engine had kicked five cars on to the track that runs out west of the little office in the west yards. Then the engine went down the straight track down on the 'Y' and left a car down by the roundhouse. The engine kicked or pushed with the front end the five cars on to the sidetrack that runs west of the office. Then the engine pushed a car down the main lead down on the 'Y' and left a car down by the roundhouse.

After it pushed the car down by the roundhouse, then the
81 engine started back north up the same track that it had gone
down, for the purpose of going up north of this little office to
a switch and then head in on the switch that would carry it over
into the old yards.

The engine did not have any car hitched to it either in the front
or rear as it came back north to go to the east yards; nothing but
the engine and tender. As it came back north to go to the east
yards it was backing. There was not any one on the rear of that
tender as it came up. Sisk at that time was in the old yards; on
the lead in the old yards. I mean in the east yards. I said that Mr.
Sisk was the man to follow the engine. I have stated that it was
the duty of the man that followed the engine to ride on the tank
as it came up. Sisk was the man that followed the engine. There-
fore he was the man that should have been on the footboard of the
tank, rear of the tank, as it backed up. But he at that time was
over in the east yards. There was not any one on that footboard
as it passed up there. I did not see Mr. Seale as the engine came
back. I- was very dark there at that point. The noise attracted my
attention. What first attracted my attention was a noise that
sounded like the breaking of glass. I was possibly thirty feet away
over on the track that runs west of the office. He was east of me;
little bit southeast. There were five cars in the string that we had
thrown out here on the track west of the office. I was on the north

82 end of the car next to the last one, next to the north end;
that is, next to the extreme car on the north end. I was
on the second car from the north. I went to the scene where

I heard the crash. I went the moment the engine passed over him.
I found him lying there. The point where he was lying I suppose
was about twenty-five or thirty feet north of the little office, there
in the west yards. He was about fifteen feet south of the switch by
which the transfer track is joined on to the main lead track. His
body was on the lead track fifteen or twenty feet south of the trans-
fer switch. He was dead when I got there. There was a gash in
his head. That was the only mark or bruise I found on him; scar
on his head. That was right on top of his head. I didn't examine
his skull. He was lying on his left side facing north, doubled up.
I mean his head and his knees were drawn together. I don't re-
member who picked up his lantern. I saw it. It was in his arms.
He had the lantern in his arms. I don't remember whether any
one picked up his hat or not. I don't remember seeing his hat.
There was nothing that indicated to me that he had been rolled or
dragged. It indicated to me that he wasn't dragged at all, but
knocked down right in his tracks. We picked him up and carried
him in the office. He was dead when I got to him.

If the engine whistled at any time from the time it left the car
down by the roundhouse until it struck Seale I didn't hear it. It
did not whistle according to my best judgment. They did not ring
the bell as it came up there. When the switchman that follows the
engine rides on the footboard on the rear of the tank he takes a

83 position on the engineer's side of the engine. On that occasion when the engine was backing the engineer's side was on the west side. If he was on the engineer's side on the footboard in the rear of the tender he would be in sight of the engineer at that place. I know whether or not that locomotive was equipped with air. It was equipped with air. There is a place on the tender in the region of the footboard to the rear of it where that air can be turned on or off. It is next to the coupler, right by the side of the coupler. That is called an angle cock. You set the air with it by opening a valve with a small lever. I know from my work there as a switchman and observation of the handling of engines what the effect of turning the air on an engine would be. It will stop it at once. I suppose that an engine when it is along, has no load, is easier stopped than when it has a load. In turning the angle cock at the rear of the tender—that is called the emergency I believe. Well yes, it is called leaking the air. When you turn that angle cock it is what you call leaking the air and makes the brake hit the wheel and bind it. You call that the emergency brake when you turn that on, the result of it is the immediate stopping of the engine. The angle cock at the rear of the engine is at arm's length from a person standing on the end of the footboard running along the rear of the engine. It could be reached by him from the place where he stood without moving out of his tracks. When he reached the angle cock all he would do to stop the engine would be to open that angle cock, allowing the air to escape. That allows the air in the air chamber to release and when that releases that allows the piston in the brake to fly back and applies the air brakes to the wheels. That locks
84 the wheels. You open the angle cock just like you would open any faucet. It has just a little lever. There is a running board on each end of a switch engine. On this occasion the engineer, whose place was on the right hand side of the engine, would have been on the west side, and if the switchman had been in his proper place he also would have been on the right side.

I know what the duties of a seal clerk were at that time. I had followed that business out there. He got the numbers and initials of each car that came in and went out of the yards. When a train comes in the yards he goes out and gets the number and initials of each car and gets the seals that are on the car doors. Whatever impression is on the seal he keeps in his book that he carries. He gets the number of the train. He gets the cars that are made out for this train according to the conductor's switch list. He puts the cards on the cars in order that the switchman may switch the train properly. After he does that he goes in the office and checks his list, checks his book in the office with the train clerk and also enters his seals. It is done in order to keep records.

A train was coming in from the north at that time. It was a freight train. The north Sherman yards was the terminal for that train. That is, that was the end of the run of that train. If any trains went south they were made up in the yards, new trains, and sent south, or other trains made up and sent north. The caboose

of that train that was coming in stopped due east of where Seale was killed or almost due east. It was just pulling in the yards at the time he was killed. I don't remember whether it had stopped
85 or whether it hadn't stopped. The yards west of the coal chutes are called the west yards, and the yards east of the coal chutes are, you might say, the yards proper. When a train came in from the north it would go into what we call the yards proper east of the coal chutes. That train on that occasion came in east of the coal chutes. Seale's duties with reference to that train were as I have described. I did not see him go into the office there. I did not see him come out of the office. I didn't see him until after he was killed; that is, immediately preceding his being killed. There is no one beaten track or pathway from the office in the west yards over to the old yards or yards proper. It is all used, all that space in there, but there is no one certain beaten path. There are some trestles that support an incline from the yards up to the coal chute running up. No there is no special path under those trestles. It was all beaten. Nearly all. People went under just whichever was the most convenient. One of the piers of the trestle was closed up. I don't remember how many piers there are. We used one for a certain purpose. That is the one I am speaking about. That is the one that was closed up. The switchmen congregated under it for water and to get warm. If a man came out in front of the office going over into the east yards he went under the coal chute in a northeasterly direction: I mean under the trestle. Seale's body was northeast of the office door. I said that one of the trestles was closed up. We kept our water there. I said that the direct way to go from the office in the west yards over to the east yards was under this trestle. With
86 reference to what would be the direct or usual travel from this office here in the west yards to the east yards under the trestle, Seale's body was on that line. The desks of the clerks were on the east side of the office building in the west yards. There were three desks in there. The door to the office that led out to the north was in the northwest corner of the office, as indicated in the plat. That is the only door. There was a window at the northeast corner. There was a door leading out on the transfer sheds to the south. That was in rather the southeast corner. Those are what are called the transfer sheds south of the office. That is where trains are unloaded and loaded and cars broken and transferred. The track that ran east of the office, the transfer track that ran east of the office, went just close enough to the office to clear and allow a car to pass down without hitting the office, without touching the office. It was about four feet I guess from the wall. The lead track was about twelve feet from the transfer track I guess. It connects with it a little to the north of the office. This transfer track runs south by the transfer shed and the lead angles off east. The two tracks came together something like thirty feet north of the office. I found the body some twenty-five or thirty feet north of the office. It was in the neighborhood of the switch. If a man is coming out of the front of the office here in the west yards in the

orthwest corner there is the northeast corner of the office to obstruct his view of trains or engines coming from the south as he goes out. He has a view when he gets around the corner of the office. If Seale had come out of the office door I would say that he was traveling northeast. And the train was backing north. That would throw his side or back diagonally to the engine as it was coming up.

Cross-examination by Mr. HEAD:

I judge that Mr. Seale's body when I found it was about twenty-five feet north of the north end of the office. I have not made any measurements of the distances about which I have been asked. I don't know by actual measurement the distance from the office to the switch stand.

I say that there are no specially defined paths around from place to place; that employes go in all directions and use the yards there, any portion of it which is almost convenient for them to travel in going to the place to which they go. There is not so much travel north from the office as there is east. But if parties are to go north the ground there is in a solid well beaten condition. This is a cinder yard and in every direction those cinders are as a rule hard, beaten. There are a number of what Judge Wood has called trestles. That is the trestle work leading up to the coal chute, an elevation by which the coal cars are carried up to the height of the coal chutes and unloaded in those coal chutes so that the coal is let down on the engines. I don't know how many of those trestles or openings under the trestles there are. I would guess there are about nine. One of them is enclosed and that is where the men have arranged for a fire in the winter time and to rest. The others you can pass through without any obstruction and the cinders under them are in a well beaten condition. If a man wishes to go in the southeast portion of the yards he would go through one of those openings under the trestle. If he wanted to go in a northeasterly direction he would go through a different opening. If he wanted to go due east he would go through still another opening provided it went in his direction. If a man wanted to go south, the cinders are well beaten, what you might call a path. There is nothing except the northeast corner of the office to obstruct the view down the lead of a man going in a northeasterly direction from the office door. I guess the distance to where the 'Y' leads off down south of the office from the point where Seale's body was found is about 150 feet. You can stand at that switch stand on that track just above where he was lying and see the 'Y' switch. I have never made any personal observation as to how far west of the lead a person can stand and see the the 'Y' switch stand. A man leaving the office door and going in a northeasterly direction toward the point where Mr. Seale's body was found, he could see the switch stand at the 'Y' eight or ten feet from that track. In approaching that track my best estimate is that eight or ten feet before he gets to it he can see down the lead to the 'Y'. After he reached that

point in approaching the track there was not anything to prevent a man from seeing down the lead. There was a headlight upon both ends of that engine. There was one on the north end as it was backing. The headlight was burning on this night. It was in its usual condition as to brightness. You could see one of those lights for quite a ways, but its brightness—those large oil lights will only shine a short distance—I would say sixty feet.

89 That would be sixty feet the brightness is actually visible, but if looking at the light you can see it a great distance.

A switch engine moving along makes a noise. The noise is the exhaust of its cylinders and its rumble as it goes over the rails and crossing the joints. It depends a great deal as to how far you can hear the noise of an engine being moved in that way. I guess on an average you could hear one a hundred feet distinctly. That is rather a short estimate. You could really hear an engine if there is nothing to prevent it for some little distance. It wasn't customary or usual in those yards to keep the bell on the engine ringing while the engine was moving back and forth. There are not any road crossings in those yards near this place. When a switch engine is doing the work in the company yards away from any crossings it is not customary to ring the bell or blow the whistle.

Q. You have stated what in your opinion was the duty of a switchman with reference to riding upon the rear footboard?

A. Yes sir.

In doing the switching in those yards as to what position a man rides on the engine is almost entirely a matter of his own convenience or was at this time. If a man was going to throw a switch if the engine was backing up he would probably catch on to the rear footboard. As a matter of fact it is the truth that at this time and prior to that time a switchman rarely ever rode on the footboard in backing up except for his own convenience.

At the time of this accident Mr. Sisk was on the lead in the old yards. He was lining up a switch, opening a track rather, for this train to go down into that yard. That was a part of his work. He was there throwing the switch to let in the train that was
90 coming in from the north, the southbound freight train on which it was Mr. Seale's duty to pick the numbers.

Redirect examination by Judge Wood:

I stated that it was Sisk's duty to follow his engine and stay with the engine. It was also his duty to go over and leave his engine and go over in the other yards and line up a switch. That is not the duty of the field man. It is not the duty of the men that come in with the train. Either the yard master or the foreman of an engine directs where a train shall come into the yards. I don't know of my own knowledge who directed as to how this train should come in that night. I don't know where Sisk is now. He isn't in this country now anywhere that I know of, as I understand it. He has been gone for some time. If Sisk was sent over there or if he left to go over there, there was not any one else left with

the switch engine whose duty it was to take up his duty at the engine. We never did duties for each other in that line. Mr. Pelly was a field man. He was on that engine. Brewer was on the engine. They were on the back end, south end, of the engine at the time it ran over this man. They were on the south end, which would be the front end, and the back the way it was backing. It was not the duty of any of those men to perform Sisk's duty unless they were told to. When they backed up to the switch to head in if Sisk had been on the footboard he would have turned the switch. After he lined up this track for the freight train to enter in it was his duty to step back up to the switch where we were to head in the old yard and line it up there. If he hadn't got up there before this engine got up there to line it up, either the foreman or the
 91 man that was with him would have done the work; that is, either Brewer or Pelly.

They had a good oil headlight on that engine. They don't have electric lights on switch engines. If you see a light down a track it is difficult to determine which way it is going; whether it is going from you or to you. It is difficult at a distance. I don't know anything about road rules; don't know whether they hood headlights or cover them up when trains pass each other frequently or not.

If an engine is running light without any cars it doesn't make much noise; doesn't take much to run it. I don't remember whether the train over in the east yards was making any noise or not. I don't remember whether it was running or just stopping or whether it had stopped. I don't remember about the noise on that occasion. There were no other engines in that end of the yard at that time. There was an engine on the lower end of the yard, switch engine. It had a switch crew also. I don't know exactly where that was at the time Seale was run over; that is, the other switch engine. In reference to whistling and ringing the bell, the switch engine occasionally whistled and rang the bell.

Recross-examination by Mr. HEAD:

I am working at present for Birge-Forbes Co. at Hoffman, Oklahoma. I resigned from the railroad the 27th of August.

I stated to Judge Wood that when Mr. Sisk was away throwing the switch to let in that other engine in the performance of his work that there was no rule or custom requiring one of the other men to ride the rear footboard in backing up unless he was told; not unless he was expressly told.

92 Redirect examination by Judge Wood:

I resigned from the work of the railway company. I was not discharged.

L. A. BREWER testified for plaintiff by disposition as follows:

Answers to Direct Interrogatories.

My name is L. A. Brewer. I am a switchman and am in the employ of the St. Louis, San Francisco & Texas Ry. Co., and at this time I reside in Sherman, Texas. As I have just stated, I am employed in the capacity of switchman and have been so employed for about two years at Sherman, Texas. I work in the day time now. I have had about ten years' experience as a railway switchman. I have worked for other companies besides the St. Louis, San Francisco & Texas Ry. Co. I have worked for the Galveston Wharf Co. and the M., K. & T. Ry. Co. I worked for the Galveston Wharf Co. about two years and for the M., K. & T. about five years and a half.

I only knew Seale in his life time as I met him there in the yard. I don't know how long this was. It was not very long, but I cannot say just how long it was. I remember the night Seale was killed. I was present at the time and place he was killed. I was engaged as foreman of the engine that killed Seale at the time. Of the crew that worked with me, there was Walter Holt, switchman; Sam Sisk, switchman, and Will Pelly, switchman. The engineer was named Whiting and the fireman was named Hartley.

93 Just before Seale was killed we had shoved some cars in on the 'Y' and were backing north with the engine. The engine was headed south and was backing up at the time he was killed. It was moving north when he was killed. Just prior to the time Seale was killed the engine was going five or six miles an hour, in my best judgment. I do not remember of the bell being rung as the engine was backing up any time after it started to back up north before Seale was killed. The whistle was not blown at that time.

I have drawn a rough sketch or diagram showing the object named in the interrogatory, signed it "L. A. Brewer" and attached it. It is about four feet from the northeast corner of the transfer shed office to the nearest track east of it. The engine was backing up on the second track east, shown on the diagram as the 'Y' lead. That is about eight feet distant.

As the engine was backing up, before and at the time Seale was run over, I was riding on the south end of the engine, or front end of the engine, on the footboard. The engine was backing up, going north. Pelly was with me.

At the time Seale was run over, there was no one on the footboard of the tender, which would be the forward end of the engine as it backed up.

Seale was run over and killed between eight and nine o'clock I don't remember the exact time, but we had not been at work long. I think this was the first night Seale had worked at the job he was on when he was killed. I was on the outside, or west side of the footboard, as the engine was backing up. I was looking
94 north. I saw a light disappear as I was looking north. I afterwards found Seale's body near the place where I saw the light

disappear. I saw some one with a lantern as I was looking up north. The lantern seemed to come from the shed and was going kind of northeast. When I first saw this light, I should judge it was some twelve or fifteen feet, maybe further, from the track on which our engine was backing up. When I saw that light going from the shed I seen it disappear, I leaned out over Pelly, toward the other side, to see if it come out on the other side of the track. I gave Whiting one stop signal just about the time I leaned over Pelly to look up front. I saw the light didn't come out, and I says "I believe we've got him," and started to drop off, and just then something hit the footboard and it was Seale's body, his shoulders. The engine stopped after it ran over Seale. It ran about the engine length before it stopped. I found the body of Seale. I found the body of Seale right between the rails, right about where I saw the light disappear. It was between the rails of the track the engine was on. The body was some twenty-five or thirty feet north of the north end of the transfer shed office. He was lying kind of bent up, lying on his left side, and I believe there was a hole in the top of his head. The questions speak of the body all the time: Seale was not dead when I first saw him; he was alive, and breathed until after we took him in the house. I say this to be sure it is right and that my answers are understood right.

There is a slight grade at this point where Seale was struck. It is slightly up hill going to the north. It was a dark night.

95 I cannot remember as to the other conditions inquired about (that is, whether it was cloudy, clear, dry or raining). My engine was equipped with air and so far as I know it was in working condition at the time Seale was killed. If this engine had been running three or four miles an hour, how far it would take to stop it by an emergency application of air is a hard question to answer. I should think it could have been stopped in eight or ten feet; at five or six four or five feet more. At six or seven, it would take eighteen or twenty feet, and at seven or eight, from twenty to twenty-five feet. I do not like to answer as to these matters, for it is only my estimate of it. I cannot undertake to say certainly. An engine without a load can be stopped quicker than one with a load. My locomotive was not hauling or pushing anything at this time. A sudden application of air forces the brake shoes against the wheels and causes the engine to stop. When I saw this light coming from the transfer shed office, the north end or tank of the engine was about even with the transfer shed office. When I first saw the light it was about twelve or fifteen feet from the track we were on. There was an angle cock on the pilot of this engine, by turning on of which the air could be applied in emergency. It is a valve or cock operated by a handle by which the air can be cut off from the rest of the train and the air pipe closed. To turn it open applies the air. It was within my reach at the time Seale was run over. To have turned this angle cock, opened the

96 pipe, would have applied the air and this would have forced the brake shoes against the wheels of the engine. This would have had the effect of stopping the engine. I do not know whether

it would have stopped the wheels or engine at once or not. If the shoes were tight enough, they might have bound the wheels of the engine at once and slid them, but I do not know as to that. If this cock had been turned on and the air applied, in my judgment the engine would have stopped in about the length of her tank, which is some eighteen or twenty feet. It would have stopped after the momentum had been overcome.

It appeared to me that unless the man with the light stopped or the engine stopped they would come in contact. I could not tell whether he appeared to see the engine or not. I could not see the man at all, only the light he was carrying. If he was looking the way a man would be looking, the way the light was going, he would have had his face sideways or kind of corner ways to the engine. I did not have any idea that he would be struck by the engine when I first saw him. I thought he would stop and not run into the engine. Then when I saw the light disappear, I thought he might be hit. I did not turn the angle cock so as to apply the air. When I first saw the light, I did not think he would go into the engine, and then when the light disappeared it was too late, and I did not think of it either. After I saw the man was in peril, I do not think the angle cock could have been turned and the engine stopped in time to prevent striking him. The engine could not have been
97 stopped in three or four feet at the rate it was going; I don't think so. It would have taken eighteen or twenty feet I would think.

There was no custom there that I know of before Seale was killed with reference to ringing the bell or blowing the whistle while the engine was moving around the yards. It depended on the engineer and fireman as to whether the bell was rung or the whistle blown while they were moving around. Some of the firemen ring the bell, and some of them do not.

In going to and from yards, going from one yard to another, it is the usual custom for a man to be on the footboard of the front end, to line up switches, but in switching back and forth in a yard, this is not the custom. The men have to be where their work is. Under the circumstances I have stated, that is, in going from one yard to another, a man should be on the footboard to line up the switches, but in doing switching around a yard, this is not the custom. The men have to be various places, wherever their work is that they are doing.

Int. 37. State whether or not you testified as a witness in behalf of the defendant upon the trial of this case during Feb. 1910? State whether or not you were asked questions and answered them on cross-examination as follows, to wit:

"Q. You say you signalled the engineer to stop after you ran over this man?

"A. I must have give him the signal about the time we hit this boy.

"Q. You were on the west side?

"A. Yes sir.

"Q. And the engineer was on the west side?

- 98 "A. Yes sir.
 "Q. What kind of signal did you give him?
 "A. Just give him a stop signal.
 "Q. It was answered immediately?
 "A. No, I don't think it was.
 "Q. You don't know whether it was ever answered or not?
 "A. No, I don't know whether he caught the signal or not.
 "Q. Did you see the engineer at the time you signalled him?
 "A. I wasn't looking at him at all.
 "Q. But he was the man you signalled; not the fireman?
 "A. Yes.
 "Q. Now you say you signalled him about the time you hit him. Did you signal him before you went around over to the east end of the switch engine and looked out?
 "A. I only leaned over where I was standing; just leaned around.
 "Q. Well, if I understand you—I don't want to misquote you—you were riding on the west leaning out like where you could see up the track on the west?
 "A. Yes.
 "Q. Pelly was to your right; you were backing north?
 "A. Yes.
 "Q. I understood you to say you saw a light come from the office door and come towards the track and then you bent around over Mr. Pelly and looked up on the other side, east side, to see whether the light came out or not. Is that correct?
 "A. Yes sir.
 "Q. Now at what time did you give the engineer the signal?
 "A. I gave the engineer the signal I think about the time
 99 we must have hit him.
 "Q. When with reference to when you looked up the east side of the track?
 "A. I gave him the signal before I looked up the east side.
 "Q. You gave him the signal as soon as you saw the engine go up behind the light; saw that they came together?
 "A. About that time.
 "Q. And then you looked around and on the other side you didn't see any light, and that is the time you told Pelly that you got him; is that the expression you used?
 "A. That "we caught him."
 "Q. Was the engine equipped with air?
 "A. Yes sir.
 "Q. Working all right?
 "A. I suppose so.
 "Q. So far as you know?
 "A. Yes sir.
 "Q. Was there any place at the pilot where it could have been turned on?
 "A. Yes sir.
 "Q. How?
 "A. By an angle cock on the front end of the engine.
 "Q. Right at you?
 "A. Within a few feet, yes.

"Q. It was in your reach wasn't it?

"A. Yes sir.

"Q. Why didn't you turn that angle cock instead of signalling the engineer?

"A. I didn't think about it.

"Q. That is the only reason?

"A. That is the only one.

"Q. Now then if you had turned the angle cock you could have stopped the engine——?

"Mr. HEAD: We object to that as irrelevant and immaterial.

"The COURT: I overrule the objection.

"Mr. HEAD: Defendant excepts.

"Judge WOOD: —instantly, couldn't you.

"A. No.

"Q. You could have stopped it in three or four feet, 100 couldn't you?

"A. Well, it is according to the speed of the engine. I presume so. We could have probably have stopped it in our tank length.

"Q. Now then it was going up grade?

"A. Yes sir.

"Q. It was going according to your statement five or six miles an hour and you saw this party going into a place of danger with a light——

"Mr. HEAD: Not to repeat it each time, we object to all the evidence of that kind about what it would have done to stop the engine as irrelevant and immaterial and not pleaded.

"The COURT: I overrule the objection.

"Mr. HEAD: We except.

"Judge WOOD: You saw him going in a place of danger?

"A. Yes sir.

"Q. You could have stopped that engine and prevented it except you forgot to turn the angle cock?

"A. Yes, I might have done that.

"Q. Now where was your engine Mr. Brewer when you first saw the light come out from the door of the transfer shed into the line of your vision?

"A. The tank of that engine must have been about the end of that office.

"Q. The front end of the tank must have been about even with the north end of the office?

"A. Yes, I think so.

"Q. It was going in a northeast direction; the light was?

"A. Yes.

"Q. And running somewhat parallel the way the engine was going but diagonally towards the engine?

"A. Yes.

101 "Q. In other words, you could see that it was going and if it kept the course it was going that he would come in contact with the engine?

CHART

TOO

LARGE

FOR

FILMING



"A. Yes.

"Q. And the danger was so apparent that you signalled the engineer?

"A. Yes, I gave him a signal.

"Q. Now was there anything to have prevented the engineer from seeing him?

"A. No, I don't know that there was.

"Q. About how far north of the north end of the transfer office did you strike him?

"A. It must have been about the length of our engine."

Answer to Int. 37. I have read the answers and questions forming part of this interrogatory. I testified substantially as therein appears, except it seems to me the stenographer has made some little differences, which do not change the meaning.

This testimony referred to is true and correct, as to the matters contained in it.

I made a statement to the claim agent the night Seale was struck, and it was a short time after he died. It must have been somewhere near midnight when I made it. I talked to Mr. Smith, Cecil Smith, about this case, since the trial, I think it is since the 25th of February. This was at his office in Sherman. I have made no written statements to any one purporting to represent the defendant since that time.

Answers to Cross-interrogatories.

I could not tell with any certainty how far this light was from the office when I first saw it. It was north of the office and it looked to me as if the man had come out of the office and gone north and then turned toward the northeast, kind of run a little circle. I have no way of estimating the distance he was from the office when I first saw him, or saw the light, rather. It was north of the northeast corner when I first saw it. I first realized that this man might be struck by the engine when I saw the light disappear. He must have been in a couple of steps of the track when this happened. From the time I first saw him until he disappeared from view behind the tank was a very short time. I couldn't hardly judge how long it was. It was a matter of seconds, but I could not say how many. There was no means in my power by which I could have prevented Seale from being struck after I realized his danger. When I concluded the person with the light was not going to stop, he was in a couple of steps, in my best judgment, of the track. When I first saw the light, I did not suppose the person with it would go on the track in front of a moving engine. I thought he would stop before he got on the track.

The engine had a headlight on the tank when Seale was struck, and it was burning at the time. There was nothing to prevent his seeing the engine in ample time to stop before going on the track.

(Deposition taken on March 7th, 1910)

(Here follows diagram marked p. 101a.)

W. R. DIXON, being sworn and introduced as a witness for plaintiffs, testified as follows:

103 Direct examination by Judge Wood:

My name is W. R. Dixon. I live at Tom Bean. I am staying at Tom Bean now. I am farming at Tom Bean. I have worked for the St. Louis, San Francisco & Texas Ry. Co. at the north Sherman yards. I commenced there in 1908, in November, 1908. I worked for them until the last night of March, 1909. I quit. I was not discharged. I worked in the coal chutes first and then I went to the transfer sheds trucking. By trucking I mean I rolled freight around at the transfer sheds where they loaded and unloaded cars and broke up trains or rather broke up loads on cars and changed them around. I worked nights at the transfer sheds. I commenced working at the transfer sheds the last night of 1908, December. The transfer sheds are over in the west yards. There is an office in front of them. I worked at the transfer sheds in the rear of the office. I can't think of the boys' names now that worked in the office there. They were clerks in the yards there. That office had two doors, one in the northwest corner and one in the southeast. The one in the northwest corner went into the yards and the one in the southeast corner went back into the transfer sheds.

I knew Memory T. Seale in his lifetime. I knew him from the last night of December until he was killed on the 16th of January. He worked there at the sheds with me. He worked there at the transfer sheds with me from the last night in December until he was killed. He was not working at the sheds the night he was killed. He had changed his occupation. He was yard clerk the night he was killed. That was the first time he had per-
104 formed the duties of yard clerk. Prior to that time he had been breaking in the cars at the transfer sheds where I was at work. He was a breaker. That means he loaded. We worked at the same place. I ran the truck up and he pushed a box on it. They called him a breaker and I was a trucker. We worked there at the same place. He was killed that night between seven and eight o'clock. He went to work that night at seven o'clock. I was working at the transfer sheds that night. I saw his body. I saw it just as quick as I could get out there where he was. I found his body before they took it into the transfer office. I found his body north of the office between the rails; thirty or forty feet, something like that, north of the office. He was northeast from the office door. I heard the engine pass that ran over him. I was in the second or third car on thirteen; twelve, I believe, I won't be positive. I was in a car on the track that runs by the transfer shed on the east side. I was at work in a car by the transfer shed. I heard the engine pass. It was going north. I think it had been to the cinder pits to put some flats in. The cinder pits were south of the office. The engine did not blow any whistle before it started north at that time. It did not blow any while it was passing. It did not blow from the time it left until it

ran over Seale. It did not ring the bell at any time from the time it left at the south here to back up north. I don't know what track it was on. I know it was going up a track east of me and
105 going north. I first went to work there in November at the coal chutes. I don't recollect what date. During the time I worked there I observed the operation of that switch engine and part of the time I didn't. I observed the custom of the engine there with reference to giving signals. When they came back in there for any purpose, when they would start out they would blow the whistle and ring the bell passing up by the office there. Whenever they would bring the engine in between the coal chutes here and the office and transfer sheds or coming out between the two it was their custom to ring the bell and blow the whistle. I said I had observed the operation of the switch engine by the switch crew the time I had been there. I couldn't describe the operation of it in reference to the men on or around the engine when it was moving because I wasn't out there. I had seen them operate it. I noticed where the men rode on the engine. They rode on the footboard in front of the engine, or behind the engine, whichever way it might be going, back or pulling forward. For instance if it was backing the men would be standing on the footboard the way it was backing. If it was going forward the men would be standing on the footboard the way it was going, forward. That was the usual manner of operating the engine when I saw them at work there; man always on there. Men worked out there day and night that were not running the engine. I don't know how many. There was a telegraph office in the yards there east of the office. I couldn't say how far. They maintained a night operator there. That was over in the east yards near the H. & T. C. Railroad track. Three men
106 worked in the office here at night. Six men worked around the sheds at night. I know the character of the incline here to the coal chute as to whether or not there was a pass way under that. That was used between the two yards. It was a public pass way from the office to the yards. I trucked from the car I was working in on to the platform and from the platform into the car. That night when the engine passed there I brought a load from the west side into the car on the east side, across the platform and into the car. I heard the engine going down, going south; went into the pits there. I didn't see it backing north; just heard it.

Cross-examination by Mr. HEAD:

I commenced working out there in November and worked until the last night of March, 1909. My work was at the transfer sheds. I was trucker. I was engaged in hauling the freight from the transfer shed into the cars on little hand trucks. I had nothing to do with a switch engine in my work. All I noticed about the operation of the switch engine was such as I would happen to observe casually in doing my work or in being in the yards there. I won't undertake to qualify as an expert witness on how the switch engine

was operated any more than what I have already said. I don't know whether or not I am qualified to tell how that switch engine was operated under the usual circumstances and conditions. The few times that I would happen to notice the switch engine was very seldom compared with the number of operations that switch engine made in the yards. I say that at the times I noticed it a man always

rode on the forward switch board of the engine. The times
107 I noticed it have been comparatively few, with the work they do on the yards. Even when I noticed it I didn't pay any particular attention to it to see whether anybody was on the foot board or not, more than just look at it. When I was looking I never thought about whether they were on there or not, other than just to have a picture in my mind such as anybody would make on a casual observation of a switch engine. I didn't pick out that feature especially in my mind and notice especially that somebody was riding on the footboard. I never thought about it that way. At all the times I ever noticed them there was a man on the footboard. They didn't ring the bell that night. I couldn't say whether or not it is a fact that on other nights they sometimes rang it and sometimes they didn't ring it. I don't know whether I have said before or not; don't recollect. I don't say that I ever noticed that engine coming out of that track when they didn't ring the bell. I don't think I have said that. I mean to say that it wasn't ringing the bell that night. I don't know whether or not they sometimes came out of that track at other times without ringing it. I don't know whether or not I ever knew them to come out of that track except on this night when they didn't ring the bell. I don't know whether or not they rang the bell every time they came out of that 'Y' track except this night. I don't tell the jury that; that every time except this one night that I ever noticed them coming out of that 'Y' track they rang the bell. I have noticed them before that; engines coming out that were fixing to go out on the

road; when they came out of the roundhouse they came right
108 up there and every time they came up there they were ringing that bell. I never noticed switch engines coming in and out there particularly, but I have noticed engines coming out to go out on the road coming up through there to get on to the yards. I noticed road engines as they came up out of the roundhouse to go out into the east yards to get their trains, and they ring the bell and blow the whistle. I haven't noticed the switch engine. I don't know whether the switch engine always did that or not. Sometimes the switch engines blew it. Sometimes they blew it and sometimes they didn't. That is a fact. That is the way I have heard it. I said that is the way I have noticed it. I couldn't say as to the custom. I can't say as to the custom about riding on the footboard. I never was a switchman. I didn't pay any attention to those things in doing my work, no more than you pay attention to anything on the streets when you are busy in a case. At the time this engine went north I was not on the west side of the string of box cars that were standing on the track west of the transfer shed. I was in a car. I don't know how many cars were in that string that I was working

n. There were three or four, yes sir. There were several cars. They were standing on the track that is just east of and parallel with and close to the transfer shed. This transfer shed is several hundred feet long and the track is right by the side of it about four feet from it. There was a string of cars standing on that track east of the sheds. The west door of the car I was in was open. That is the door towards the shed. The east door toward the engine was closed. I was inside of one of those cars. I couldn't see the engine. I have no reason to notice it particularly except for the noise that it made. That caused me to notice it, but before I heard the rumble of the engine I had no reason to notice it. I had no reason to think of whether it blew the whistle before it started up or not.

Redirect examination by Judge Wood:

There was a freight train coming in from the north about that time. I did not hear it whistle coming into the yards. I did not see it. Some of the boys said the local came in from the north. All I know is what some of the boys said. When an engine came out of the 'Y' or when it passed between those sheds and the coal chute, all the time I ever noticed it it usually whistled and rang the bell. And the times I noticed them operating the switch engine there would be a man on the footboard the way the engine was going, in front.

R. H. PETERS, being sworn and introduced as a witness for plaintiffs, testified as follows:

Direct examination by Judge Wood:

My name is R. H. Pepters. I live in Denison, Texas. My occupation is that of laundry man. I have been in the railroad service, for the M. K. & T. Road on the south end. I was in their employ from 1890 to 1906. I was round house wiper up to running a locomotive. I have been an engineer. I ran a locomotive as locomotive engineer about five years for the M. K. & T. I am familiar with the operation of locomotives and application of air to them to stop them. If a switch engine, properly equipped with air, was going slightly up grade, working steam, at the rate of five or six miles an hour and there was nothing attached to either end of the locomotive, that is, it was neither hauling or pushing any load, if the emergency brake was applied, if it was a light engine it could stop mighty quick. Whether or not the engine was full of water and coal and had large or small wheels would have something to do with my opinion. I would say it would take anywhere from two to five or six feet in order to stop. I am figuring on an engine with a small wheel; that is, truck that we used on a switch engine at the Katy yards. The leverage is greater on small wheels than it is on the large wheels in order to keep the wheels from sliding. You can stop it a little quicker with a smaller wheel. If this had been a large wheel engine and heavily loaded with water or coal, the wheels could have been stopped right immediately. The application of air stops them immediately, stops the wheel, but that wouldn't stop the

momentum. That wouldn't keep the wheel from sliding if it ~~was~~ heavily loaded with water or coal. If the engine was moving five or six miles an hour and loaded with water and coal both and an application of the air was made going slowly up grade, I couldn't answer within what time it should be stopped under those conditions because the load would have a tendency to carry the engine with it, slide it. It would slide. The application of air would immediately stop the revolution of the wheels. All that it would go would be what it would slide. Under those conditions I don't think it would go very far. That is my experience, that it would not slide very far; maybe three or four feet.

111 Cross-examination by Mr. SMITH:

The estimate I make as to the distance it would go is after the piston traveled out to its full extent as far as it could to the wheel. I took it for granted that they had—the valve they use now days shuts itself off as soon as it is released. While you were receiving the signal and shutting off the engine and reaching for the brake valve the engine would move some. That wasn't considered in my estimate. It takes some time to do those things. Of course it is short, but it is some time.

Redirect examination by Judge WOOD:

I didn't say that the application of the air shuts off the valves. I said releasing the throttle. There are throttles made with a Ballinger valve. When they are released by the hand the Ballinger steam pressure closes. Made small on one side and large on the other to overbalance the main throttle *throttle* that cuts it off. It takes not to exceed a second to apply the emergency brake when you are in reach of the valve or cock that turns it on; just merely to do it; that is all. It is done already.

Recross-examination by Mr. SMITH:

As to whether it is done already or not depends on what you are doing at the time you get the signal. I am speaking now of the time it takes an engineer to do those things. They usually operate and stop trains.

Redirect examination by Judge WOOD:

If an engine is equipped with air and has a valve or angle cock by the side of the coupler on the pilot, if the valve is in lap
112 position it will have the same effect of putting on the air in the emergency as if the air is applied at the regular valve. It will have the same effect if the valve in the cab is on lap position; that is, ports and other end of line covered; but if it is in full release position which opens the ports at that end, it will take it longer to have effect because it has got to overcome the difference of the air that is coming out at this port. I mean if it is closed at the other end. The end that I meant was the end where the valve is, engi-

neer's valve; lap, at running position is a very small vent. It is practically closed, at any time. What they call running position is position this valve is in. I am not right up on air because there have been several changes since — left the road. They have changed the valves considerably but the principle of it is the same. If the valve was in running position it would have the same effect.

Recross-examination by Mr. SMITH:

It has been four years in July since I was connected with railroad service. I said the turning of the angle cock would have the same effect if the valve in the engine was in running position. Running position is the position that it is to be carried in. It is to be left in that position in case of emergency. If the valve of the engine was in full release it would take the angle cock on the tender a little longer to have effect. It would have to overcome the difference, the discharge in the supply. That depends on the size of the pipes.

113 T. S. HENSON, being sworn and introduced as a witness for plaintiffs, testified as follows:

Direct examination by Judge Wood:

My name is T. S. Henson. I live two miles and a half northeast of Van Alstyne. I am engaged in farming. I am on Ed Turner's place.

I have worked for the St. Louis, San Francisco & Texas Ry. Co. I worked for them last year, year 1909. I went to work on the 14th of January I think. I quit the 15th of June, 1909, according to my best recollection. I was not discharged; just got in bad health and couldn't have my health and had to quit. I was a boiler washer at the round house in the north Sherman yards. I was a day hand and worked at night and day both. I have had other railroad experience. I was engineer on the Rock Island at Shawnee, Oklahoma. I ran a switch engine about eighteen months. I have had other experience as a railroad man. I fired for the Katy at Denison. I fired for the Katy at Denison about three months I think, three or four months, in the yards. I haven't had any other experience. I remember the night Mr. Seale was killed in the north Frisco yards. I was on duty that night. I was at the roundhouse office about twenty or twenty-five minutes after seven. I did not see Mr. Seale that night. During the time I was at work at the Frisco north Sherman yards I did not have occasion to observe the operation of the switch engines only washing them when they came in the round house; going over them. Oh yes, I noticed them operating out in the yards. I began working there on the 13th or 14th of January.

This accident happened on the 16th. I noticed the operation
114 of the switch engine prior to the time that Seale was killed.

The custom was to ring the bell and blow the whistle at dangerous places, coming out of the 'Y' or passing that dead line there in front of the office. And they had another local place at the transfer sheds and then another local place where they leave

this to go around that way to the 'Y' west of the round house. They would ring the bell and blow the whistle when they came in or went off the 'Y' down here, and when they were passing between the transfer sheds and coal chutes and when they crossed what we call the dead line north of the office. That was called the dead line out there. That line was number ten or twelve I believe. The line that I called the dead line was the cinder pit line; goes down to the cinder pit. There was a passageway across north of the office. That led from this transfer shed over to the east yards. That was a beaten path there. I don't know whether there were a number of people or not that used that pathway across there, but all of those men that were clerks or anything made that pathway backwards and forwards across there. That was used day and night. It was their custom to blow the whistle and ring the bell when they approached that. In the operation of that engine prior to the time Seale was killed it was the custom for a man to be on the footboard on the front of the engine the way it was going. They always had been when I didn't have any job and was up there every day, sometimes two or three times, going around through the roundhouse and switch yards and there would be one man or two on the front end of
 115 the engine if they were going backwards—the way it was going there would be one or two men on the footboard. I knew the engine that ran over Seale. I had seen it in the yards there. I had seen the engine often. I know the engine they use there at night. The number of it is 3670. It was a switch engine. It was a very good engine. It had large wheels. I had been a road engine in time. It was a pretty good engine. I am familiar with the yards there. It is up a grade a little up this main lead track to the north by the office here. If that engine is properly equipped with air, in working order, and is running five or six miles an hour along that track up grade, and the air was turned on in emergency it would stop in a foot or two. You could apply the air that quick. Just an instant is what I mean by that; quick as you can snap your finger.

Cross-examination by Mr. SMITH:

I railroaded about two years and five months at different places. The first place was at the Katy about three months. That was in 1888. I was firing. My father got sick and he was subject to cancer and he was there at Denison at the time and I had to quit and sort of wait on him a little bit. When I quit firing for the Katy I stayed quit for a little over a year; never did go back to work for it again. I went back home. The next place I went to railroading was here at the Frisco in Sherman. That was in 1909. I worked there about five or six months. I also worked at Shawnee. That was in 1896. No, I don't mean fourteen years ago. It was in 1906. I was boiler washer for the Frisco. That was the last work I did. It has
 116 been four years since I worked at Shawnee. I ran a switch engine there as engineer. I didn't go up there and get a job as engineer. The engineer got fired and the switch foreman put me on running because I had had experience with it. I worked as engineer eighteen months. I drew the salary of engineer. I had had

experience before I went on the switch engine. I had had experience with locomotive and stationary engines. I had experience with locomotives in the shops working as machinist helper and things. That was at Shawnee. I worked nineteen months at Shawnee.

Q. Then you worked in the shops a month and then went to running an engine. Do you mean to tell this jury that you were put to running an engine with but three months' experience; don't you know that ain't so?

A. I know what I am talking or I wouldn't speak.

I went through an examination. I swear that I was put on an engine with two months' experience firing and one month in the shop. That was on the Rock Island road, on the Shawnee division. I quit that because I just got tired of it and wasn't of age and father wrote up there and they fired me. I wasn't of age. I sa-d an engine running five or six miles an hour without any load would run about a foot or two after the brakes were set in the emergency. If it was going twenty-five miles an hour it wouldn't run six feet. If it was going sixty miles an hour it wouldn't run six feet. If the engine was running sixty miles an hour and the air brakes were in proper condition and you put the air in emergency it would stop
117 in six feet or less. If it was going up grade a little bit, after the air was attached and nothing behind it it would stop in a little bit, or throw it off the track one. If it was carrying *forth* cars it could not be stopped quicker than the engine by itself could. If it was empty cars the weight of those cars would push the engine and the wheels would be locked and might slide on the track. If you had a train line of air on the cars it would stop every one then; have the same pressure on the car wheels as it would on the engine wheels. An engineer could stop an engine a little bit quicker than he could a train of thirty cars by throwing the air in emergency, because there wouldn't be any pressure behind it to sort of push it a little bit, slide on the track. Certainly he would get more braking power on a train of thirty cars and engine than on just one engine. Certainly the engine is heavier than any one car. My experience and the books don't teach that you can stop a train quicker than you can an engine by itself. In my judgment you could stop a train of forty empty cars with a full train line of air running sixty miles an hour in three or four feet. If it was running twenty-five miles an hour it would be stopped in less time. Might stop in a foot and then might go two feet. Two feet would be the outside limit. And going five or six miles an hour it would be a foot. If it was going four miles an hour you might stop it in six inches. If it was going four miles an hour and there wasn't any leak in the air, air all in good condition, it would stop just as soon as the air was attached; wouldn't go any distance at all. It would stop
118 right now. It wouldn't go an inch or two if the air was in good condition and brakes were all in good condition and everything. It would just drop or either jump off the track. When the air is attached it just tears it up right that way. I never did pay enough attention to this engine to tell just exactly the tons it would

weigh. The number of the engine—and it is supposed to weigh as it is numbered; it would weigh about 37,000 tons. I mean 37,000 tons. That is, if it runs like the other engines of that number run. 74,000,000 pounds would be right according to the number that is on the engine. It might not have the number of the engine that it is supposed to have on it. They have got a great many engines that do weigh that much. I never did have any business, any contract, any way to tell about the weight of cars at all. I don't know about cars only just kicking and switching them. An engine that weighs 74,000,000 pounds is not an ordinary engine. It is a large engine. They were using a large engine. I have ridden on this engine that killed Mr. Seale. I was not well acquainted with the engine any way only washing the oiler out. I was around it. I have been around it a great deal. I rode on it twice I believe from the time I went to work there until the night Mr. Seale was killed. I didn't work there two nights before he was killed. I worked the night he was killed. I didn't work two nights before. I was a day hand but I was called back that night to work. I was not working with the switch engines except washing them out in the roundhouse. That was my work. I was just riding on that switch engine. I

119 didn't have any work to do at that time anywhere. I was on the pay roll, but I had no work to do. I rode on it one morning about ten o'clock. That was the first morning I worked there. I just rode from the roundhouse up to the coal chute and water tank and got off up there and walked back. It is about a hundred yards from the roundhouse to the coal chute. The next time I rode it was next evening. I don't remember about what time it was. It was those two rides and before then, before I went to work there, that I gained my experience as to what the custom was about handling that switch engine before Mr. Seale was killed. I noticed around the yards. This dead line was right on the corner there. I mean that track. That goes on north of the coal chute and water tank and goes down to the cinder pit. I call that the dead line track because there are negroes working in there all the time. They don't go over it without signals. It is down grade. The cinder pit is where they knock fires and this dead line is where they shove cars down that dead track and when the switch is thrown the engine always whistles or rings the bell before it goes down in there to give those hands a signal. The 'Y' track leads right off that track. That track is four or five feet lower than the other tracks and they run cars down in there so they will be low enough to throw cinders in. That is the dead track. An engine never goes into that without giving a signal before going in. Some of the others they go into without giving signals. Out on the south of this coal chute and roundhouse a piece out there on the main switch tracks they don't give any signals. I don't know just ex-
120 actly where Seale was killed. I know where the north end of the office is and I know the switch track that runs along down into the transfer sheds. I know the 'Y' lead that runs along down here by the coal chutes. The dead line track doesn't run that way. Say here is the coal chute here. This dead line comes down

there from that main line and comes down this way. No, I don't think there are two tracks between the transfer shed and the coal chute. There is one cinder pit south and one north of the coal chute. The one north of the coal chute the track comes right down by the side of this tank and transfer shed and comes on down here nearly to the roundhouse; to the south corner of the roundhouse.

Q. Isn't there just one track that runs down there; ain't that it right there; supposed to represent it?

A. That might be supposed to represent it, but those switches would come off there. There is one comes off but I don't think it goes to the cinder pit.

Redirect examination by Judge Wood:

Q. Do you mean that engine weighs 37,000 tons or 37 tons?

A. 37 tons; 37 tons and 700.

I can't tell you right now how many pounds there are in a ton. I said I washed this engine out 3760. I remember that there was an angle cock near the pilot, on the pilot. That is in reach of a man riding on the footboard of the pilot. It was an angle cock with a rubber hose there that went on a pipe that went up to the air and it was just like a faucet and had a lever back that way and had a thing there and this lever was to catch with your hand and turn it. That would set the emergency. Turn it one way and the air was off and turn it another way and put the air on.

Recross-examination by Mr. HEAD:

I have turned on this engine when it was at the round house. I turned the one on this particular engine before this accident; had to let the air out so if a man went in under this pit here to work and some fellow was up sitting around in the cab and mess with the air brake, sort of turn the air brake, it would break an arm or something. I turned the back one on the tank.

H. S. COWELL, being sworn and introduced as a witness for plaintiff, testified as follows:

Direct examination by Mr. HAVEN:

My name is H. S. Cowell. I live at Denison, and have lived there about eighteen years. My occupation in life has been railroad conductor, freight conductor. I have had experience as brakeman and conductor, over a period of twenty-five years. I have worked for the Missouri Pacific as brakeman and conductor. That was in 1882. I have worked for the Cincinnati Southern. That was in 1889. I was running a passenger train then. I was conductor on it. I came to Denison in 1892 to the M., K. & T. I was employed by the Katy there on the north end as brakeman. I have worked as conductor for the Katy out of Denison. I broke about nine months and have been running trains as conductor out of there twelve years.

I understand the air in braking apparatus as used on locomotives and trains; understand how it works. It depends on whether it is a light engine or train as to the distance it will go when the air is applied in emergency. A train with a number of cars and put the air in emergency would stop quicker. I know it can be stopped. If a switch engine is going up a slight grade with the tender in front, backing up a slight grade, going at the rate of five or six miles an hour, having nothing attached to it, that is, not hauling any cars and not pushing any, it could be stopped at once by an emergency application of air. I don't think it would travel two feet.

Cross-examination by Mr. SMITH:

If it had a string of cars attached to it it would make a difference. If it had a string of cars equipped with air it would take more distance to stop. The motion of the cars would naturally shove them a little. You get more braking power on an engine with cars attached than on an engine by itself in proportion to the weight. I have not always understood from the railroad engineers and others that I have associated with and it is not a matter of universal expression of experience of railroad men that a train of cars can be stopped quicker than an engine with more cars. A car is lighter than an engine and there is about as much braking power on a car as there is on an engine, yet I say that they can stop the engine by itself quicker than they can an engine and a car. I am not working for the Katy now. I severed my connection in 1906. The occasion was I made a mistake and got fired. I am not doing anything at present. I say they can just put the brakes on and they can stop at once going six miles an hour. As soon as you get the brakes set it won't move any distance at all. If it was going fifteen miles an hour it is not the same thing. It wouldn't stop so quick. With a light engine going fifteen miles an hour it would go fifteen or twenty feet perhaps. If you had a train of cars it would go farther. I couldn't say how much farther. If the brakes were all in good condition they would stop within a few car lengths. It would make a difference in an engine with ten cars and an engine by itself going fifteen miles an hour and stopping. The difference would be a car length or so perhaps. You could stop an engine in fifteen feet, but it would take about sixty feet to stop an engine and cars. With a passenger train out on the road running thirty thirty miles an hour, by an emergency application of air they could stop perhaps in about a hundred feet. I have seen an engine going five or six miles an hour stop in two feet, switch engine. I don't know as I could state exactly where. I could not state exactly when. If the engineer got the signal to stop at once he could stop at once, as soon as he applied the air. It would take him some time to take the signal and some time to get hold of his brake valve and some time to shut off the steam. If he got a signal at once to stop he could stop at once. It wouldn't take but a few seconds. It wouldn't take any more than five seconds before he would apply the brakes. It would take that much, about that much. It would not run fifteen

or twenty feet in that five seconds. It would run about three or four feet. I never did have any experience as an engineer.

124 Redirect examination by Mr. HAVEN:

There is a lever right up here and all the engineer has got to do to put the air in emergency is to turn it just like you would jerk a faucet. If a switchman on the footboard wants to stop there is an angle cock right there at the front and rear end of the engine and he just turns it. He makes the same movement that the engineer does; just opens the cock. That puts it on the same as the engineer. It applies immediately as soon as the movement is made.

Recross-examination by Mr. SMITH:

If you had much steam on the engine would go farther with the brake applied than it would without steam. In making an emergency stop the engineer closes his throttle. He does that before he applies the air. I know because I have been on engines quite a number of times. I think I have been on them half a dozen times. If the brakes are applied to the wheels while the engine is working steam, it would have to have considerable steam on to move the engine regardless of the brakes.

J. L. LEWIS, being sworn and introduced as a witness for plaintiff, testified as follows:

Direct examination by Judge WOOD:

My name is J. L. Lewis. I live in East Sherman. I have lived there going on nine years. I am a carpenter. I knew Memory T. Seale in his lifetime. I was personally acquainted with him
125 something like four months I suppose. At the time of his death he lived on North Montgomery Street. He had rooms with me. He lived at the same house. His family consisted of just himself and his wife. They lived in the same house with me; did light housekeeping. I remember the time that he was killed. I went to the place where he was said to have been killed after that. I went out the next morning after he was killed that night. He was killed on Saturday night and I went out Sunday morning. There was some one with me. Mr. McKinney, J. M. McKinney, was with me. We went out there to see where he was killed and to find out how he was killed if we could. The place was pointed out to us where he was said to have been run over. That place was a little north of the office in the west yards; north and east. As well as I remember it was some fifteen or twenty feet, might have been a little more; I couldn't say exactly; fifteen or twenty feet north of the north end of the office; north end of the transfer shed; the office was over in the northwest corner of that building. The office was in the northwest corner of the transfer shed building; that is, the door that lead out. I don't know whether the office reached clear across the building or not. I don't know whether the office was plumb across the

transfer shed or not. He was some fifteen or twenty feet or possibly more north of the north end of the office. There was a door in the office leading out north. If that plat represents the office, the door lead out right over in that corner, northwest corner. The place pointed out to me as where he was found was northeast from this door. There was a pool of blood there on the ground at the place pointed out to me. I didn't find anything else there except the dirt seemed to be dragged up or had been thrown up some where the blood was; looked more like it had just been dragged up, like something had been dragged along the ground. If I remember right the west rail of the nearest track to the transfer shed on the east was about four feet from the transfer shed. I measured that distance. The northwest door was the only door on the north side of the office. I think that is the only door. If a man was going from the northwest door of the office in the direction of where I found this pool of blood his face would be to the northeast. A train coming up from the south on the tracks there would be to his back. The coal chute was back here. That is the track to the coal chute ran right along on the east side of where I found this pool of blood, that is, the trestle leading from the ground to the coal chutes. That trestle was east of the place where I found this pool of blood. The ground was considerably beaten all over, but there seemed to be a path leading out to the northeast from the office door here towards the trestle of the coal chute. The pool of blood was somewhere near where the pathway crossed. I couldn't say how far north of it or whether it was north of it or not. It was somewhere near the pathway.

Cross-examination by Mr. HEAD:

I couldn't say how far south of the switch stand that pool of blood was. It was somewhere near it as well as I remember. I don't recollect about the distance. Possibly it was twelve or fifteen feet. I couldn't say though that it was. I think it was in between the two rails of what was called the 'Y' track, that is, the track that lead off down to the 'Y.' It was somewhere near to where they come together, but I couldn't tell; I don't remember how close. The ground around that place north of the office all in between the tracks and in between the rails and all of the ground is covered with cinders. I suppose people walk in all directions there. There seemed to be more travel going that way under one of the berths of the trestle and immediately south because there was some kind of a shack built in under that trestle. They couldn't go right square east. I don't know whether that shack is what they call the Y. M. C. A. or not. I don't know what they call it. They had a fire there. Well I don't know that there was any more travel leading south of that shack than there was leading north of it, from the simple fact they had to go either north or south of it to get across. They went most any direction there or could go most any direction that suited them and the walking would be good. The cinders were more or less packed down here like they are in railroad yards. I measured from the transfer building to the first rail on that first track and

as well as I remember it is just forty-four inches. That was the only measurement I made.

Redirect examination by Judge Wood:

The shack I have reference to was under the bent of the trestle leading up to the coal chute. One path way lead north of that and one south of it, over into the east yards, traveled each way from the fact that they had to go around one way or other. The
128 switchmen had a fire there the morning I was there; the men that were standing around there. In going to the spot I followed one of those paths. I went in on the south side though; followed the path to the shack.

Recross-examination by Mr. HEAD:

By saying path I don't mean that there was any place along there that had worn out and had sides to it. There were not any gulleys there. All that path that I spoke of was just simply a place that was a little slicker and looked to be used more than the rest; seemed to be traveled more. The indications of his having been dragged extended south of the pool of blood three or four feet; looked like the dirt had been dragged up; might have been some of them dragged it up to cover it up. It was partly covered. I don't know.

F. H. SEALE, being sworn and introduced as a witness for plaintiffs, testified as follows:

Direct examination by Judge Wood:

My name is F. H. Seale. I live at Platter, Oklahoma. I am related to Memory T. Seale. I am his father. He was twenty-five years old at the time he was killed. I only had one son. He was raised in Texas most of the time, pretty well all the time. He was born in Texas, Hunt County. When my boy was being raised I was engaged in farming part of the time and part of the time I was working at the carpenter's trade. I raised my boy to work. I raised him to do farming, what work he did. He was raised on a farm. My boy was an energetic hard working boy. He was very industrious. His habits were good with reference to sobriety. He
129 never drank any. He weighed about from 155 to 165 pounds. His height was something near six feet. He always had good health; big stout robust man. He was an affectionate son towards myself and my wife. He was always ready to do anything that was needed done or anything that he saw that we needed he was ready to help us. I sent him off to school. I sent him to school before he got large enough to help me much. I sent him to school at Wolfe City there in Hunt County until he got tired and didn't want to go and then I told him if he wouldn't go I would put him to work and I believe, best I recollect, I worked him three years. Then he took a notion that he would go to school again and I sent him to Whitewright to the Earthman College there. I think he went there something like eighteen months, I believe. He took a business

course. I don't remember the time, how long he did go. It was over a year. He came home and waited around there to get a job and he got a job here in Sherman. I was living in Oklahoma near Platter at that time. The first man I believe he worked for here in Sherman was Smith, R. E. Smith, the alfalfa Smith. I think he worked for Smith something near a month or about a month. He told me the work he was doing was something about shipping hay for Smith,—clerk or something about shipping hay. I don't know that I do know where he went from there to work. It seems to me like *to* went to Denton County and worked a while at farm work again. He came back here then and went to work for the express company. He went from there down to the ice plant
130 and worked quite a while. He went from there to the Frisco yards and where he was killed. My son sent me five dollars one time. I don't remember about what time it was. It was after he went to work for himself. It was after he was married. That is the only sum of money he ever sent me.

Mrs. J. E. SEALE, being sworn and introduced as a witness for plaintiffs, testified as follows:

Direct examination by Judge Wood:

My name is Mrs. J. E. Seale. I am the wife of F. H. Seale, who has been on the stand and the mother of Memory T. Seale deceased. My son was twenty-five years old the 23rd of October before he was killed. My son was affectionate towards my husband and me. He was energetic, smart steady boy. He wasn't carousing around at all. He was sober. He never drank. I remember that he sent my husband some money after he was married and working for himself. He sent him five dollars. He did something for me in a financial way. He had his Woodman of the World policy made over to me. He had a thousand dollar policy in the Woodmen that was made payable to me. He took that out before he was married. He never changed it after he was married; left it payable to me.

Mrs. MAUDE SEALE, being sworn and introduced as a witness for plaintiffs, testified as follows:

131 Direct examination by Judge Wood:

My name is Mrs. Maude Seale. I am one of the plaintiffs in this case. I am related to Memory T. Seale, deceased. I am his wife. We did not have any children. Memory T. Seale was twenty-five years old in October before his death. He was twenty-five in October before he died in January, 1909. We were married in September, 1906, in Sherman. I was following an occupation here then. I was clerking for Stinnett & Son in the dry goods store. He was with the American-Pacific Express Companies when I married him. I had known him since the last day of December, 1905. I knew him from December, 1905, and married him in September, 1906. He was working for the American-Pacific Ex. Co. when I first knew him. We met in school at Whitewright,—Earthman Busi-

ness College. He went to work for the American-Pacific Ex. Co. on the last day of August, 1906. He was "on hand" clerk for them, in the office. He did drive a wagon for them after he was on hand clerk for about two months and a half. He then took the wagon. He was with the wagon until March, 1907. He quit the express company then. The first two or two and a half months he worked for the express company while he was on hand clerk he got \$40.00 a month. When he took the wagon he got \$50.00 a month. He did not get any more than that while he was working for the express company; not unless they would be checked up over. Of course little odd change if they were checked up over always came to whatever employé had it. From the express company he went to

132 work for the ice plant here in Sherman; Sherman Ice Co.

He was night watchman there. I know what salary he got as night watchman. He got \$50.00. He did some extra work. He loaded cars of ice for shipment. He was paid extra for that; paid by the car. His regular salary was \$50.00 a month while he was working there and some months his extra for loading cars would make his salary something like \$72.00 or \$74.00 a month. He would bring that money home and tell me to go pay the bills,—grocery bills. He would turn it over to me. I was the banker for the firm. I paid all the bills except his barber bills. He was on long hours and couldn't pay them. He was on duty and he reserved enough to pay his barber bills. That would be all he would take out of his check for his own use. The rest he turned over to me to manage and buy. He never did carry pocket change, said he would always lose it. He was with the ice company until about the middle of December, 1908. I don't remember the exact date. I know where he went from there. He went to the Frisco shops. He was working in the sheds breaking out there. He received \$50.00 a month for that work. He got another job there. He was yard clerk. I know when he received that job. It was the night he was killed. Well he received it the night before, but he went on duty that night. He went on duty the first time at seven o'clock the night he was killed.

He left home that day about six or a few minutes before. I
133 can't think what time it was when I next saw him. I think it was about twelve, twelve o'clock that night. They brought him home. I don't know what time they brought him home. I didn't see him for a long time. I think it was about twelve though. He was dead when he was brought home. He was indeed a kind and affectionate husband.

Cross-examination by Mr. HEAD:

He was making fifty dollars a month while he was working for the Frisco. While he was working for the ice company he sometimes made extra time. That was in loading cars. That only lasted during the busy summer months that he got extra time.

Q. Now out of that fifty dollars a month he first took out a little bit that he himself spent, his barber bill and some things of that kind?

Q. Now out of that fifty dollars a month he first took out a little

barber bill. I didn't know he had any dues to the railway company. I don't know anything about any hospital fees or anything of that kind. When he — paid in money he brought the money home and when he was paid by check he brought the check and I would cash the check because he worked long hours and the banks were closed when he was off duty. He had been paid for part of a month after he had been working for the Frisco. He brought the check home and it was cashed at O. L. Bailey's. I cashed it at Mr. Bailey's. I paid four dollars on the furniture and paid the grocery bill and took the rest home. He smoked sometimes. He got his tobacco at the grocery store and had it charged and I paid it with the grocery bill. He might have spent — cents besides what I paid
 134 out with the bills but it was very low. He had his barber bill. He didn't dress very nicely only on Sunday. He had one nice suit after we married. He worked in blue overalls and shirts and I made his shirts to cut down expenses. We were paying twenty dollars a month on a little piece of land and were paying for furniture and house rent and for what few clothes we had. It was spent for our joint expenses. I did not spend it on myself any more than he did on himself. It was divided between us; all went for expenses. If he sent any money to his parents or gave them anything it had to come out of those earnings. We were married in September, 1906. We had been married between two and three years—about two years and four months before he was killed. He worked for the ice company from March until the middle of December.

Redirect examination by Judge Wood:

I was twenty-four years old in November before he was killed. My husband was a tall man with broad shoulders, robust, weighed about an average of 150 and 160 pounds. He was in perfect health, strong, healthy man. From the time I knew him he always worked; was never idle.

J. M. McKINNEY, being sworn and introduced as a witness for plaintiffs, testified as follows:

Direct examination by Judge Wood:

My name is J. M. McKinney. I live at Whitesboro. I am farming. I carpentered up until January a year ago. I live near Whitesboro and farm now.

135 I knew Memory T. Seale in his lifetime. I don't remember how long I had known him. I had known him a year or so; don't know just how long. I remember the night he was killed. I went out to the Frisco north yards where he was killed afterwards. I went there next morning, Sunday morning. There was some one with me. Jim Lewis and a man named Nelson were with me. I saw the place where he was said to have been run over and killed. That place was a little north of the office on the west side of the yards. It was somewhere about fifteen or twenty feet north of the office. No, where the sign was it was probably a little

rather than that. It was maybe thirty feet. I saw some signs on the ground. There was some blood there and part of a lantern globe. I noticed the character of the ground leading from the door of the office in the west yards over northeast to the east yards under the coal chutes. There was some evidence of travel there. The place where I saw the blood was something like fifteen or twenty feet north of where the foot path crossed the track. I suppose that path way was leading something like east, little northeast, from the office. I don't remember whether there was one path leading south of the shack and another one north. I didn't notice but one path way. It lead off in a northeast direction from the office; ran under the coal chute. I didn't make any measurement as to the distance from the east wall of the office to the nearest track east of it. I don't know whether I could estimate the distance or not. I don't suppose it is over two or three feet. I noticed a door in the office. It was near the west side of the office on the north end.

136 * Cross-examination by Mr. HEAD:

The yards out there are cinder yards; that is, the grounds are covered with cinders. They are packed down by travel over them. They seem to be pretty level. The ground there is all level, about as level as that floor or nearly so. It is all pretty near the same as that floor there. The only path that I speak of would be a place that would appear on this floor say where there was more travel across this floor right through here than there would be at some other place on it; same as around a carpet around a table, but there were evidences there of the yard being used in every direction just like this floor is. If a person happened to want to go south he would turn around the corner of the office and go south apparently and the only thing that caused the path was that there seemed to be a few more people that wanted to go just south of that shack under the trestle than other directions. That was all.

Redirect examination by Judge WOOD:

There were some yards over east of the coal chutes. There were tracks over there and cars. There is a box car over there used for some kind of an office. I wasn't in it. That path way was a direct route from those yards over there to this office here.

Plaintiffs close.

137 J. J. WHITING, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Mr. HEAD:

My name is J. P. Whiting. I am a locomotive engineer for the Frisco Railroad at the North Yards in Sherman. I am still running a switch engine. I have had twenty-six years' experience now as a locomotive engineer. I have been an engineer for twenty-six years. I have been here at Sherman four years last December. I have

been running a switch engine all that time. I was running the switch engine the night Mr. Seale was killed. I was handling the engine at the time of the accident. Prior to the time of the accident we had shoved a string of cars down on what they call the 'Y' just beyond where this accident occurred. We had taken some cars down on the 'Y' in front of the engine and left them there. I couldn't say how many we took down. I do not know what kind of cars they were. I know they were freight cars. At the time the accident occurred we were coming back with the engine;—I don't know where only by signals. The engineer doesn't know where he is going to when he starts down the track only by signals. None of the train crew, switchmen or foremen tell me when I start out where I am going as a general thing. I have to watch the switchmen for signals to know where to stop and what to do. They give me signals to stop when they get ready. As I approach a switch I look for signals from the switchmen. As I came out of the track from the 'Y' I didn't know where I was going to; didn't know where I was going to stop. I was looking back. Just before
138 I got to this switch that goes into the freight house I looked ahead to see whether they wanted to stop there. There is a switch there leading from the lead that runs by the coal chutes down to the freight sheds. I should judge that that switch is between fifty and fifty-five feet, somewhere along there, north of the northeast corner of the office. That is the switch stand that I am speaking of. As I was approaching that stand at the time the accident occurred I had been looking back all the way, but when we got to the corner of the sheds I looked ahead to see if the switchman was going to give me a sign to stop at that switch. By looking back I mean I had been looking north. As I came out of the 'Y' and came on up the track I was looking north. That was towards the rear of the engine which was backing. Just before I got to the corner of the freight house, sheds, I looked back in the other direction, south, towards the front end of the engine where the switchmen were standing on the engine. Before I looked back I did not see anything ahead of me, any light or anybody. So far as I knew or saw when I looked back the track was clear. When I looked ahead it was clear for quite a distance as far as obstructions are concerned. It seems to me as near as I can remember now it was just getting dark. I think it was about eight o'clock if I am not mistaken. At eight o'clock in January it is pretty dark. It was getting pretty fairly dark. I looked to the front where the switchmen were riding on the step for a signal, to see whether I was going to get a signal to stop at that switch or not. That was the
139 switch I was just approaching. I don't know when the accident occurred. I didn't see it. I didn't get a signal from there though and by that time I was pretty near up to the switch stand and I looked back again to see that the switches were all clear behind me and I heard somebody call out from the hind end and I turned around again and they gave me a sign to stop. I applied the air in emergency and stopped and waited there a few seconds to see what they wanted and I saw a man start down towards—you

could see something lying on the track there in front of the engine and I said to the fireman "I wonder if one of those switchmen got hurt" and I got off the engine and went down in front of the engine and saw this man lying on the track. I was looking back south and I didn't get any signal and I then looked again north up the track. I didn't look ahead a great while there; just enough to look ahead to see whether they were going to give me a signal or not; couldn't have been more than two or three seconds I looked ahead. By ahead I mean south. That is really to rear, but it is towards the front of the engine; always call that the head; always speak of ahead as towards the front of the engine. I just looked ahead two or three seconds, and then looked back north. When I looked back north I did not see anybody approaching the track, or any lantern or anything that indicated that anybody was doing so; didn't see any sign of a light. I heard somebody call and looked back and got a stop signal. Then I applied the air in emergency and stopped.

After I got the stop signal I had to shut off my throttle and
140 drop my hand down to the brake valve and turn the brake valve to put on the air. I was working steam at the time. I shut the throttle off the first thing, and then I dropped my hand down to the brake valve and turned the brake valve to put on the air. After I got the signal to stop, I stopped just as quick as I could stop it. I applied the air in the emergency. That is the quickest way to stop an engine if your brakes are in good shape, and good working order. My brakes were in good working order. Both the day men and the night men take care of their own brakes. On this particular occasion it was in fair working order. I think it was about thirty feet after I got the stop signal before the engine stopped; thirty-five feet maybe; I couldn't be exact. It wasn't quite as far as the length of the engine and tender; a little shorter than that if anything. The stop made by that engine was such stop as could usually be made by the engine by that means; that is, as quick as you could stop here. That was the usual stop in the emergency. As I said, the engine moved about thirty or thirty-five feet after I applied the air and the brakes took hold. Applying the air and the brakes taking hold is almost instantaneous. The minute you get the signal you apply the air and the brakes take hold right away. I shut off the throttle. That doesn't take a second. I don't know how far an engine going six miles an hour will move in a second. I never figured it out. I think about four or five seconds from the time I got the signal the engine stopped. It wouldn't take more than two seconds to put that
141 throttle in; just about two seconds to go through those motions; to realize that you have to stop and then stop; and then it takes about three seconds I think to do the work, for it to come to a stop after the brakes take hold. It all takes four or five seconds. The regular way and usual way for switchmen doing the work to cause an engine to be stopped in the emergency is to swing their lantern cross ways violently. That means stop as quick as you can. We have a signal that calls for you to stop as quick as you can. That is it; what we call violent signal. Among railroad

men it is known as a washout signal. I have been working with the Frisco here four years last December. I haven't seen an engine stopped in the emergency by the use of the angle cock manipulated by the switch engine crew. I never saw it done, not in this yard. I have never known the engine to be stopped in an emergency by the switch engine men by the use of the angle cock. I can't recollect an instance. The angle cock on an engine is used to cut the air off; couple up the cars and connect up the hose and that angle cock is to cut the air off when you separate the engine from the cars and keep the air from going through the pipes, keep the air in the engine. There is an air brake equipment on the cars, but the reservoir that supplies it is on the engine. In order to make the brakes on the cars work you couple up the engine with the cars by means of that angle cock and hose connected with it. I have seen somebody jump on the hind end and turn the angle cock when the engine started to move off and nobody on it. That is the only time I ever saw it used to stop an engine. I don't know of more than

once or twice in all my experience that that has occurred.

142 All the members of a switch crew control the movements of the engine, starting and stopping it. The foreman is supposed to control the actual work of it. He does it by giving signals. The foreman of the engine actually controls the movements of the engine. The engineer handles the engine. I judge the engine was going about five or six miles an hour at the time the accident happened. I had just come out of the 'Y' track. I couldn't say exactly how far that 'Y' switch stand is from the switch stand at which the accident occurred. I think it is between a hundred and a hundred and twenty-five feet, somewhere along there, as near as I can guess at this moment. I had started from just in the clear of the 'Y' switch stand. We came to a dead stop there at the 'Y' switch stand; about half a car length farther in than the switch stand; south of the switch stand. I was working steam at the time of this occurrence. By that I mean I had the throttle open. By that I mean that the steam was going into the cylinders, propelling the engine. I don't think the bell on the engine was rung at that time. The whistle was not blown before we started out. It is not usual and customary to ring the bell and blow the whistle in switching there in the yards. It is not customary to blow the whistle at all unless you want to call for signals or something of that kind; blow a signal for the way master, blow a signal for the repair track, and if we see a car break away anywhere call for brakes. If I see somebody on the track and they don't see the engine coming, then I would blow the whistle. It is not customary to ring the bell

143 in the yards unless we go across a road crossing. There is a road crossing up in the other end of the yard and we ring the bell going across that. I guess that is a quarter or half a mile from this place. We were not going to that road crossing on this trip that I know of. It wasn't customary to blow the whistle or ring the bell in passing in and out this particular track we were on at the time. We hadn't been doing it. There are men around the yards walking on the ground during the day time and at night; all

the time. There are men working on the repair tracks right around there all the time repairing cars and there are men that inspect the trains before they go out and as they come in. They walk through the yards, and brakemen and conductors walk through the yards. There are men walking around those yards more or less all day and to a certain extent at night. We don't keep the bell ringing all the time for them. If you are working steam pretty hard the exhaust of the engine makes a considerable noise but that is the only noise except the ordinary rumble of engines and cars approaching. I don't think there are any written rules with reference to whether the engine men keep a lookout for people on the ground or people on the ground keep a lookout for the engine. There are various opinions with respect to whether or not any one should ride on the forward footboard, the footboard first advancing. Out there doing the work they most always ride on the end where you cut off from doing the work they most always ride on the end where you cut off the cars. They most always ride on the end where you cut the engine off from the cars. They *They* will cut the engine off and turn around and catch on to the step whether it is on the front end or back end, whichever way the car is coupled to them. I don't know that there are any printed rules that someone shall always ride on the forward footboard of an engine in motion. In going down town they generally ride on the footboard whichever way they are approaching. That is to protect the crossings. In doing the switching there in the yards on the lead track and those tracks from it if they are going to go either way to couple on to a car somebody always rides on the footboard to couple on the car. They ride on either end; whichever way the car happens to be. If they are in front of you they ride on the front footboard and if they are behind you they ride on the back footboard. The position that a man rides on the engine in doing the actual work there of switching is governed by a matter of convenience in doing the work. In doing the switching work there so far as I have ever known or know there is not any custom or requirement or rule that some one must ride on the forward switch board for the purpose of keeping a watchout for people on the track; not for that purpose. When they ride on the front footboard it is for some purpose in connection with the work. Some one doesn't always ride on the forward footboard of a switch engine in doing the work, unless we are going to couple on to cars. When they are going to couple on to cars some one always rides on the forward footboard. Some one don't always ride on the forward footboard.

145 Cross-examination by Judge Wood:

I have had about twenty-five years' experience as an engineer. I have worked on the Santa Fe; I have worked on the Frisco; worked on the Illinois Central; worked on the St. Louis, Iron Mountain & Southern and Burlington and the beginning of my experience years ago was on the New York & New England. It is out of existence now. I have had twenty-five or six years' experience. I think a man with that experience ought to understand the business pretty

well. I haven't pulled passenger trains very often. I have been in the freight service all that time; never got to the dignity of a passenger engineer in twenty-five years; never stayed long enough with one road to be a passenger engineer; changed around too often. I have not been a regular switch engineer at more than one place. This is the only place I have ever been a switch engineer regularly. I have been an extra switch engineer at other places; been what they call on the board, extra board: run a road engine or switch engine, whichever you happen to catch. I have run switch engines in a good many yards. I know the proper way of doing the switching. I know how they do it. I know the proper way. There are always men around switch yards whose work requires them to be there, switchmen and others: for instance clerks in the yards and car repairers, and fellows that load coal, and repair engines, and fire knockers and various and sundry men that necessarily have to be around the yards day and night to do the work. Then we have various switches in the yard. Then we have cars scattered about on various tracks.

146 Q. So really the proper way to do that switching is for a man to ride on the front footboard the way the engine is going isn't it?

A. Well I don't know what they consider the proper way. I haven't got anything to do with that.

I don't know what is proper. I don't know what the company thinks proper.

Q. I don't want you to get off on the company or what the company thinks; but isn't that the proper way to do the business; you say you are an expert engineer; to keep a man on the front footboard the way the engine is moving; if it is going forward have him on the footboard on the pilot; if it is backing, have him on the footboard at the back?

A. It is owing to what you mean by proper. If you mean customary way I don't understand it so.

Maybe if I was general manager I might consider it the proper way and order it done. Otherwise there is nobody to look out for the switches except the engineer and fireman; nobody to look out for stray cars except the engineer and fireman and nobody but the engineer and fireman to look out for persons that might get on the track. It is not the duty of the engineer and fireman to look out all the time. I don't keep a lookout in front of my engine the way it is going all the time. It is not my duty to do it. I did testify in this case once before as a witness. I didn't testify that it was the duty of the engineer running that switch engine to keep a lookout;

not in those words I didn't. I am pretty sure about that. I
147 am pretty sure positive what I said in that case. No, I haven't thought it over since. I didn't testify on the former trial that it was the duty of the engineer to keep a lookout the way the engine was going; not for that alone.

Q. Well, for that and other things; keep a lookout for men on the track or split switch, open switch, or stray cars or anything; in other words, to look where you are going?

A. No sir, that is not what I said.

I don't mean to look out for that alone. I have got to take my vision away lots of times. There are other things that take my vision. The fireman is supposed to look out as much as the engineer. He is not supposed to shovel coal all the time. He doesn't ring the bell all the time either. It is his duty to keep a lookout as well as the engineer. His attention is taken away shoveling coal part of the time the same as the engineer's attention is taken away about other things. When I am looking back taking signals I don't understand that it is then the fireman's duty to look ahead and see if the track is clear. He may be putting in a fire or putting on the injector. If he isn't doing anything else connected with the engine he is supposed to look back. I think the fireman was looking back when we ran over Seale; I don't know; but he was on the other side of the engine. By looking back I mean towards the back part of the engine; the way the engine was going; looking north. The engine was backing north and I call forward to the front of the engine and back to the back of the engine. At the time we ran over Seale I suppose the fireman was looking backward. I

148 don't know. He wasn't doing anything else and when he isn't doing anything else then it is his duty to be looking the way the engine is going. I had been looking back the way the engine was going from the time I left the 'Y' until just before I got to the corner of the little office I said. I had gotten in maybe ten feet of it. When I got in ten feet of the corner, north-east corner, of the little office north of the sheds I turned and looked back ahead; back from the way I was going. I looked for my foreman. My foreman was L. A. Brewer. He was what is called engine foreman; yard foreman. I was under his direction and control. He controlled the movements of that engine. I moved it under his signals; not under his orders; he never gave me any orders. A signal is not an order. I obeyed it. If he had come up and told me to move it I would have done it. I obeyed his signals in that case. It was my duty to obey his orders. I turned around and looked forward long enough to run over him. It evidently seems so. When I got back looking the way I had been looking the thing was all off. They don't keep that angle cock on the locomotive for ornament. They keep it on there for use, as I explained a minute ago.

Q. Never use it in but one instance; that is if the engine is trying to run away they run up and turn it?

A. No sir, I said but once or twice in all my experience have I ever seen it done.

I have seen an engine stopped that way. I have turned the angle cock myself when I would be on the ground. He can stop it there just the same as I could in the cab. When the air is applied the brakes take hold right at once and it stops. It does move after the brake shoe clings to the wheel. It doesn't slide then. That

149 wheel goes around but the brake shoe is bearing against it and will stop it eventually; doesn't stop it right now. That is what we call putting it in the big hole, but it doesn't always stop

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it right now. I didn't tell Mr. Head on direct examination that after you get through putting the air on, when you once get it on, it stops right there. It doesn't stop it in an inch. You can put it on so suddenly with a light engine as to almost throw a man off of it if the man had hold of anything. If he hasn't got hold of anything and it is going fast and stops quick it would. We call it an emergency; not because it stops it at once; it doesn't stop it at once. It doesn't stop it so quickly that it would have to slide if it was going fast. It doesn't slide unless it is on a slippery track. It will not slide ordinarily; not on a dry rail. It wouldn't slide where I was running it that night; couldn't have slid out there at all; didn't slide. It wouldn't stop instantly just as soon as the air takes effect. The air takes effect instantly but the engine doesn't stop instantly. The brake shoe will stop it in a few seconds, but won't stop it as quick as that. It might stop it in three or four seconds. I don't know how many times the wheel would go around; never did count it. I suppose it would depend a good deal on the condition of the brakes. If the brakes were in good condition it might go four or five revolutions;—owing to the steam that was in the cylinder. To put the air on it only takes a moment. Just as quick as a fellow could grab the angle cock and turn the

150 handle around it is done; doesn't take half a second. That engine was equipped with air and it was in good working order. I told Mr. Head the brake shoes were in good order. Everything about it was all right for the application of the air and stopping it. It was a switch engine. It had forty-four inch wheels I believe; three sets of wheels the same size. It had the big drive wheels of a road locomotive; not a passenger locomotive. Some road engines have the same size wheels. We had just taken water an hour before that. The tank was pretty near full. I couldn't say how much coal we had. They take coal at noon. The hostler takes coal at noon. We don't take it. We take water at night when we go to work at seven o'clock. I suppose that tank holds about three thousand gallons. A tank of water will last us at that class of work about seven hours. We had used up between one-sixth and one-seventh of it. Our coal had not run very low. I expect the tank might have been half full of coal. As near as I can judge I expect there was a couple of tons of coal on the tank. I was running five or six miles an hour. I was not pulling or pushing anything. You can't tell how much steam you are working. All you know is you are working a light throttle, just enough to keep her going. There is no way of telling how much steam you are using in the cylinders. By light throttle I mean I didn't have it on full force. You can put on a small amount and run the engine. I had just enough to run five or six miles an hour. I keep my throttle in my left hand. I work the emergency brake with my left hand. It is to my left. I generally have my right hand resting on the window sill when I am running an engine. I think as

151 near as I can tell the front of the footboard in front of the engine was pretty near even with the front of the office when I got this signal; maybe a little beyond it, little north of there;

not more than four or five feet. The south end of the engine was even with the north end of the office or a little past the north end at the time I got the signal. About ten feet before I got to the north wall of the office I turned and looked back, looked forward as I call it; looked the way I was coming from. I didn't keep my eyes that way until I got the signal. After I looked back and didn't get any signal I looked back the way I was going. There was another switch behind us only a short distance. I was looking backward, as I call it, then until I heard a switchman call out and that attracted my attention ahead again. I turned my head back and looked for signals and didn't get any and immediately turned north. I couldn't have been engaged in that operation more than two or three seconds. Looking for signals and turning wouldn't take over a second if you were going to turn around and look right back again, but I didn't do that. I looked back to another switch up there the way I was going. I just looked back and saw the foreman, Mr. Brewer, and got no signal and immediately turned and looked forward the way I was going. I never did see anybody on the track. Then after I heard somebody holler I looked south again and saw a stop signal. Then I just took my left hand and shut the throttle off and then took that left hand and turned
152 the angle cock. The way I got the signal I was bound to be in a hurry. I just shut the throttle off and dropped my hand right down to the brake valve and turned it. It is almost one motion. To shut the throttle off you shoot it forward. You have got to make three motions; push down and pull. As you come down you can pull it almost as you go. I shut the throttle off and dropped that way. A fractional part of a second is pretty quick time. You can take your watch and see how quick you can drop your hand down. I should think it would take pretty quick time to do that. I think it took at least two seconds to do that. Just running five or six miles an hour I went about two-thirds of the length of the engine and tank. I got off my engine after I stopped. I got off and went down. I thought it was one of the switchmen got hurt at first. I saw a man lying there on the track. He breathed three or four times; I don't know how many times. They carried him in the yard office there. I don't think he breathed after we got him inside the yard office; not into the yard office; into the office of this transfer shed. That angle cock is there to use in an emergency if they want to use it. It is not there for that purpose. The purpose of it is to couple on to cars. It can be used for emergency. Sometimes it is back where you can't reach it. On this engine it was where it could be reached. It was in reach of the switchman standing on the footboard. No, I don't think that could have been turned fifty times before he could have hollered and signaled me to stop. He couldn't have done it any
153 quicker than he could signal me and me turn it. I could turn it as quick as he could if I was down there. I wasn't down there though. A man on the front end is hanging on with one hand on the rod and has got his lamp in the other hand. I know how they generally hang on there. I can't tell from where

I was how Brewer was swinging on the engine; can't see. Brewer, just by one motion, could not have grabbed and turned the angle cock and stopped the engine. He has got to turn around first. He didn't have his face to the north; generally ride with the face to the south. He doesn't have to see me. I am the one that is looking at him. He knows I am looking for signals, with his back to me. I don't know whether he was riding with his face to the north or not. If he was facing that way all he had to do was just the motion of one hand in an instant to turn that angle cock and stop the engine. If he was facing north he would have been in that position. That is all that was necessary to stop the engine, just a movement of the hand just that way. Well I would still have my throttle open, be working steam. The steam was heavy enough to move the engine. I would have known it the moment the air was applied. I might have thought the air hose was bursted under the engine. I wouldn't pull the steam on full and pull against it. I would stop. Instead of stopping it that way he hollered first and then I looked back and he was swinging his lantern violently across the track; called a washout signal. I was looking back. I didn't look ahead towards the south until he hollered. You don't have to turn your body. All you have to do is turn your head. When I looked there I saw a very violent stop signal with a lantern. I turned my head around and shut off the steam and dropped the same hand down and shut off the air. In the meantime I went about two-thirds of the length of my engine and tank.

I testified on the former trial that as to whether the bell is rung or not depends on the fireman. The fireman rings the bell. The rope doesn't go across. Sometimes in switching up and down the yards the bell was rung and sometimes it wasn't; if there was anybody on the track. I don't think I said that some firemen would ring the bell and some wouldn't. He never rang the bell by my directions at the time we ran over Seale. Often times I have seen men near the track and would be afraid they would step on the track and I would tell the fireman to ring the bell. If he was on the track and I thought he was in danger I would blow the whistle. If I saw he was in danger I wouldn't tell the fireman to ring the bell; I would grab the whistle, but if I saw a man walking along the track and was afraid he might step on the track I would tell the fireman to ring the bell. If the fireman rang the bell and he didn't get off, then I would blow the whistle. If the fireman was shoveling coal and I saw a man going along there I would blow the whistle then. I knew there were men working around in the yards. They are working there twenty-four hours out of the day. There is a great deal of passing here between the office here in the west yards

and the east yards under the coal chutes. I never did blow the whistle or ring the bell when I passed along there that

I know of. I might have done it if somebody was passing along there, but not to my knowledge I don't recollect it. I know I didn't ring the bell. I don't remember of blowing the whistle.

Redirect examination by Mr. HEAD:

I should judge that engine weighs between seventy and eighty tons.

J. W. HARTLEY, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Mr. HEAD:

My name is J. W. Hartley. I am a fireman and work for the Frisco at the North Sherman yards. I have been a fireman four years. I am fireman on a switch engine. I have been fireman on a switch engine about four years; have done all my firing on a switch engine. I was the fireman on the engine on the night Mr. Seal was killed. At the time of the accident we were backing up and I was looking back the way we were going. I was looking north. I was on the left side of the engine. That would be the east side. The engineer was on the right side or west. The engine tender was back of us. By back I mean in the direction we were going. It was a wedge shaped tank. If a person would approach the track from the opposite side to me at the rear of the tender I don't know how far from the tender he could be and I seen him from my position as fireman. Maybe he could be fifteen or twenty feet. In

156 other words, the rear end of the tender obstructs my view of any one approaching from the opposite side towards the rear of the tender; that is, any ways close. If they were up close I could not see them from my side. If I was in my seat in the position in which I was on this occasion on the left hand side, and the tender is north, I suppose a person could stand on the west rail fifteen or twenty feet from the tender and still be obstructed from my view by the tender. I am just giving my opinion. I did not see any person or anything to indicate that there was anything on the track or approaching the track at the time of the accident or just before it at any time. I was looking ahead. I was not doing anything else; no work about the engine. That is all I was doing. The first that I knew that anything had happened was the engineer stopped and says "what's that; have we run over somebody." I was still looking the way we were going, and I looked back and saw something lying on the track and men standing there with lamps in their hands. I did not know that anything had happened before the air was put in the emergency. I would judge the engine went half the length of itself, maybe farther, after the air went into the emergency. I never paid much attention to it, but I judge it went about half the length of the engine perhaps after the air actually took hold and I felt the jar of it. The engine on that occasion stopped about as usual for an emergency stop. So far as I noticed I would think that would be a usual emergency stop. I think we were going about five miles an hour perhaps just prior to the accident. I did not have any
157 occasion to notice particularly any distance or speed or anything of that kind about the engine on that occasion. It

has not been usual and customary since I have been working there in the North Sherman yards in doing the switching for the bell on the switch engine to be rung or to be kept ringing. I have been working here a little over four years. It was not usual and customary to ring the bell or keep it ringing as we passed in or out of the track on which we were at the time of this accident. It is not usual and customary to blow the whistle as we start into or come out of the track or to blow the whistle as we move up and down the tracks there in switching at any time. The only time that I have noticed them blowing the whistle is whenever they want a train to come in; train be on the hill and they blow two whistles for it to come in; cars break in two in switching they blow one whistle. I ring the bell when I see something on the track. There is no special reason for ringing the bell as you go up this track. I don't think so. It is not customary for one of the switch crew to ride on the back end of the tender, or whichever end may be moving forward, to keep a lookout for people. Nothing controls a switchman in selecting the position he will ride on the engine only getting to switches I suppose and making coupling into cars he rides the front end of the engine. He rides at the most convenient place. I don't know of any rules that call for one of the switchmen to ride on the end that is moving forward for the purpose of a lookout. I never read any. Men frequently do ride on the forward footboard. There are times in backing up that they don't ride
158 on the rear footboard that I have known of. At times when we are down at the lower end of the yards and start back up they will get back on the back end of the tender, but in ordinary switching the majority of them except the man following the engine—he rides on the front footboard on the head end—but the others generally catch on wherever it comes handy. I suppose the North Sherman yards are to receive trains and switch them out and make them up; make up trains and switch trains. Out in the yards outside of the round house along those tracks they switch cars on those tracks the majority of the time. There are two switch engines operated in the day time and one at night now. They work at night generally all the time from seven to seven. Day engine works from seven to seven, I believe, one of them, and one works from six to seven and the other from seven to seven in the morning. The switching there is going on practically all the time. There is a lead track that comes down running northeast and southwest. That is the main lead. That runs in a diagonal direction. Then there are tracks that lead off from that to the south. My engine in doing switching works on the north lead mostly. It is headed south as a rule. The south end of the engine as a general thing has hold of the cars. The south end has hold of cars a good deal more than the other way because they make up most of the trains from the north lead. When the engine is doing the work of switching on the north lead the south end of the engine is used the most. They use the south end a right smart more than the north end. They use it almost entirely when the engine is headed south; that is,

159 when it is working on the north lead. We were working on the north lead this night. When we are working on the north lead the men usually ride on the south switch board, south end. That is the end where they do all the coupling. There were headlights on this engine on both ends. They were oil headlights. They are the kind that we use in the switch yards. A good oil headlight ought to throw a light fifty or sixty feet I guess; that is, actually throw it on the ground. You can see the headlight quite a ways looking towards it. I don't know how far; see them very plain from one end of the yard to the other. I don't know how long those tracks are. They are four or five hundred yards I reckon. You can see that very easily. I was not ringing the bell at the time of this accident. I didn't think it was necessary; didn't see anything on the track. I was not in the habit of doing it. The whistle was not blown before we started back up that track. They have no written rules with reference to the engine men being required to keep a lookout for people on the ground in doing switching in those yards or the people on the ground being required to keep a lookout for the switch engine in order to protect themselves. I never heard of any.

Cross-examination by Judge Wood:

I now live on North Broughton Street in Sherman. I have been in Sherman ever since this thing occurred. This is the first time I have testified as a witness. I have been on that switch engine a little over four years. I never ran a switch engine before I came to Sherman. I began work here at Sherman as fireman. That was a pretty good sized engine; regular switch engine. It 160 had three wheels of the same size on each side. I don't know what the size is. I don't know what is the weight of the engine. I would judge it to be about a seventy or eighty ton engine. I don't know how much coal we had on it; haven't much idea. It had not been coaled that night since I had been on it. We must have had pretty near a full tank of water. We had taken water on that night. We took water at seven o'clock. That engine has no pilot, that is, what you call a cow catcher. It has nothing in front of the engine except a footboard, horizontal board, for the switchmen to stand on. Then it has one at the rear and then it has one of those sloping tanks. The tank slopes down towards the footboard to the rear. I suppose that is made so you can see over it easy. Like this is the back of the engine, the tank slopes off that way to the rear. The object of that is so you can see over it. It wouldn't obstruct the view when you are backing the engine. With a switch engine you catch hold of a car either way, don't make any difference which end, front or back. I told Mr. Head we worked that engine usually with the front end south. As a matter of fact I never undertook to find out by actual observation how far I could see over that tank when we are backing up. My knowledge as to how far I could see is absolute guess work. I was looking to the north the way the engine was going. I was sitting on the side.

I have a seat there. I was on the east side and the engineer on the west side. I never did know that anything had happened even when the engineer stopped the train until the engineer spoke and

says "what's that; somebody run over?" I didn't know

161 anything about having hit a man until the engine had stopped and the engineer spoke to me and I looked back

The headlight was sufficient to have shown me any obstruction on the track. I was looking right on the rail on my side as we went up. That track is pretty near straight running along there, but it makes a curve about where we stopped. Passing up this lead track that we were on, it is straight along from the time we pass those transfer sheds to where we hit him. I didn't see the engineer at that time until after we had stopped. The construction of that engine is not such that we can't see each other. The boiler doesn't divide us. We are there in the cab and each one is in sight of the other. I don't know what the engineer was doing immediately before Seale was struck; have no idea. I was sitting on my seat looking to the north and I don't know what he was doing. I know that the whistle was not blown and the bell was not rung from the time we went out down there after putting those cars on the 'Y'. From the time we started back until we hit him we didn't blow the whistle or ring the bell at all. I judge we were going about four or five miles an hour. That is not about as slow as you can run an engine. It could be run slower. That engine was equipped with air and the air was all in good working order as far as I know. The brakes were all in good working order. There was nothing wrong

with them that I know of. It responded to the application of

162 the air; worked all right. I observed that. When you apply

the air with the emergency brake they generally stop. I shove the piston and the lever then on the piston works the brake against the wheel. When the air is applied it stops the engine. We were neither pulling or pushing anything, running four or five miles an hour. The application of the air wouldn't stop it at once. I don't know that it would. The momentum of the engine is to keep it from it; weight of the engine. The brakes might not have been taken up with the rigging tight enough. Running four or five miles an hour with the brakes all right, the emergency wouldn't stop it right now. It would not practically stop it in its tracks just the engine without anything to it, and apply the air. It would go two or three feet, maybe farther than that, according to your piston travel; if you have got your brakes up tight; sometimes you can't work them tight. If the brake piston was tight and the brakes were tight and the engine is without any load running four or five miles an hour, I would not say that an application of the air in emergency would practically stop it instantly. We have the emergency brake to stop with. We haven't got two valves. It is all the same; service application and emergency application: all the same valve. You put the service application on gradually. With the engine running four or five miles an hour, sometimes you might take that service application and stop it by gradual application in four or five feet. If every

163 thing was working all right it might be that you could. When you slap on the emergency the wheels might slide on you. We were going up the lead. The emergency application takes effect right now. That is the object of it. When the engine is going four or five miles an hour and the emergency application is made there is the weight of the engine to carry it on. When the engine is running four or five miles an hour and the air is applied in the emergency there is nothing to keep it from being stopped in four or five feet if everything is in working order. I don't think it was raining that night; don't remember whether it was cloudy or clear or what.

Redirect examination by Mr. HEAD:

It sounded to me like the air was actually applied in the emergency on this occasion. The braking apparatus was in good condition so far as I know. It seems to me that half the engine length or about fifteen feet is about as far as it went after the brake took hold. Those were the actual facts. I don't know what is the height of the top of the tender above the deck of the engine. I don't think I could see over the top of the tender standing down in the deck. The top of the tender would be something like the height of my eyes or a little higher.

Recross-examination by Judge Wood:

I was up on the seat. I was not standing on the deck.

164 WILL PELLY, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Mr. HEAD:

My name is Will Pelly. My occupation is that of switchman. I have been a switchman about four years. I have worked for the Cotton Belt and Frisco Railroads. I was raised in Sherman. I went to work for the Frisco the 18th. of December a year ago. I think it was. I was working the night that Mr. Seale was killed. I was working as switchman that night. At the time of the accident I was on the front of the engine on the footboard. I was on the engine that struck him. I was on the south end of the engine. The engine was backing up. I was on the rear end backing up. I was on the east side of the engine standing next to the draw bar. The angle cock was right about the front of the engine there. It comes down where the air hose is. I was right at the side of it. It was on the west side of me from where I was standing. It was not between me and the draw bar. I was between the draw bar and the angle cock. I was on the east side next—two of us standing on that side of the draw bar and I was standing in the middle next to the draw bar. I was between the angle cock and the draw bar. I was on the west side of the draw bar. I was on the east side of Brewer standing next to the draw head. We were both on the west

side of the engine. Brewer and I were on the west side of the draw bar. It is in the middle of the engine; footboard. The first

I knew of anything unusual occurring was when something
165 hit the footboard and I jumped off. I felt something hit the footboard and I jumped off. That was the first I knew that anything had occurred. That was Mr. Seale's body that hit the footboard. I think I was facing south just prior to that occurrence. When I saw that something hit the footboard I mean the footboard that I was standing on. I couldn't say why I was riding on the rear footboard or the footboard that was at the head of the engine the way it was going; because the front footboard was closest to me; cut off from the car and I got on right there. The one I got on was nearest to me when I swung on to the engine. In doing the work out there as a switchman you get on anywhere that comes nearest to you; that is the way I do; I don't know of any rule. I ride on the footboard where I can do the work most conveniently and best. There is not any custom that I know of and hasn't been since I have been working in the yard requiring some one of the men to ride on the rear footboard as the engine backs up. Some one doesn't always ride on the rear footboard as the engine backs up, and didn't prior to this time that I know of. There is no custom that I know of in doing the switching there in the yards at the north lead with reference to whether the bell is rung or not. The bell is very seldom rung, because there are no road crossings there only up at the north end of the lead where it goes across at the Old Settlers' park. That is the only crossing in the yard. The engine itself makes a rumble or noise in moving. You can hear it standing away from the engine a piece. You can hear a
steam engine running. I couldn't say how far you can hear

166 a steam engine running working steam up a light grade.

There is no custom or method of doing the work there in those yards that I know of by which the bell is rung in passing in or out of this track that we were on at the time of this accident. If they want the way-master they blow the whistle and if they want the rip track that they keep locked they blow the whistle. That is about all that they blow the whistle for. I don't believe I ever heard them blow to notify anybody that might be on the track or might be coming towards it. Cinders cover the ground in the North Sherman yards, especially at the point where this accident occurred. Those are packed down smooth; hard; they are tolerably hard. All the grounds there in the yards are used. Men pass in any direction at will. There are a good many people about the yards there at various parts of the yards. I don't know how many. I don't know how many men are out there at the yards. I couldn't guess at it. I wouldn't guess at it. I don't know. There are shops out there to: repairers, round house people. They just go in every direction whenever they quit work. In my experience as a switchman they have never stopped an engine in the emergency by using the angle cock since I have been out there. I don't know whether they have before I went out there or not. I never knew of any of the switchmen doing it; not in the emergency. When we

want to stop in emergency right quick the way we do is to flag the engineer. It is not a very uncommon thing for switchmen to stop in emergency or to call for a quick stop. Our engineer is generally always looking at us. It is not a very uncommon thing in the yards for us to call on the engineer for a quick stop. When
 167 we want to stop quick or in the emergency we signal the engineer. I did not see the deceased Mr. Seale before he was struck. I wasn't at a place where I could see him if he was ahead of me. I don't believe I could. I don't know where we were going to as we came up the track; don't know where the engine was going. That was controlled by Mr. Brewer. I myself didn't know.

Cross-examination by Judge Wood:

I don't know where Brewer is now. I guess he is out there with the witnesses. I am working for the Frisco now in the capacity of switchman. I am still switching. I have been switching ever since about December 10th, a year ago. I went to work switching about December 10th, 1908. I was working a little less than a month when Seale was killed. I was a new man. I think Mr. Tom Moore was yard master then. He was night yard master. Mr. G. W. Edgerton was day yard master. It seems to me like it was that night after this occurrence that I made a statement to the railway company. I wouldn't say for sure. I think it was that night that I made a statement. Morrison, the claim agent, wrote it. I couldn't say how long it was after this boy was killed. It wasn't so very long. I wouldn't say how long; wasn't very long though; hour or two hours, something like that. I had not had any instructions up to that time as to how the switchmen's duties were performed; just went to work; I had just been working since about the 18th. I never had had any instructions. All I knew was just to
 168 watch and see how the other fellows did it. The night that Seale was killed I think they kicked some cars in west of the transfer office and then shoved some down to the 'Y'; down there somewhere; I don't remember where it was; I think it was in the 'Y' though. As we went down to the 'Y' I rode on top of the cars that we went down there with. I don't know where Brewer rode. I didn't see him. I don't remember who cut them off when we got down there. When we started back north I didn't know where we were going. I crawled on to the rear end of the engine on the footboard. It was the rear end backing up. It was the front of the engine but it was the rear as we backed. Brewer got on. I don't remember which one of us got on first. Brewer was on the outside of the footboard; on the west side. I don't know what attitude he was in. I don't know whether he was looking up the track or whether he was facing south or not. I don't know what he was doing. I was east of Brewer standing next to the draw head. I was looking south. I held on to something. I held on with one hand to the hand rail that is on the front end of it. I don't remember which hand I had hold with. I don't know how fast that engine was running; wasn't very fast; I don't know how fast though. No,

I don't believe I could estimate it. Brewer and I were not talking as we went up there. I don't think there was a word passed. I had a lantern and he had a lantern. Mr. Whiting had control of the movements of the engine. He was engineer. Brewer was foreman.

It went and stopped and started when he was. Sisk was up
169 at the main line I think where the track leads off in down towards the sheds. I don't know whether his place was on the rear of the tank or not. His place at that time was over where he stopped to line up that switch. There were two men with that engine. He was supposed to stay up there and line that switch up. It is not the business of one man to ride the rear of that engine, front the way it is going, for the purpose of looking out for switches, looking out for cars and lining up the switches. We don't ride those footboards backing up. If we would come to a switch against us and wanted to get in, the engineer is supposed to look out for that too. He is held responsible for running through them. If he wanted it opened or closed I don't think the engineer would open or close it. He would stop and let somebody throw it. We would pace around from the rear to the front then if it came handy. It doesn't take very long to stop and walk the distance of the engine. It is not a fact that in order to properly carry on that work it is necessary for a man to be on the front of the engine in order to line up the switches and open them. The way we do business there is to run up there and the engineer stop and then we hop off and run around; don't have to run; you take your own time for it; you have to stop and start. The biggest part of what I was looking out for was the pay I was getting. That is what I was out there for. If all four of us had been down towards those cars we would all four have climbed on the footboard at the head of the engine as likely as not, and when the engineer got up to where he wanted to stop one of us would crawl off and take our own time and go around and open the switch. It was the proper way to do that business
170 for a man to have been on the footboard in the rear of that tender as the engine backed up there. They never did blow the whistle or ring the bell when they came down there between the coal chutes and the office. I don't think they did. They never rang the bell or blew the whistle when they got to this path way that crosses the track from the west to the east yards. People used that a great deal. That was the regular route from the office across to the east yards and from the east yards back to the office. The fact of the business is they never would blow the whistle except to call the way master. There was nothing to blow the whistle or ring the bell for. They never did blow the whistle for any purpose except to call the way master while I was out there. Yes, I have seen some engines stopped with an emergency application of the air. I have never seen a switchman do it since I have been out there. Well I don't know as I ever did. My idea of the proper way to do that is to signal the engineer and let him put it on.

Q. If you saw you could prevent running over a man by the application of it you wouldn't do that; you would just signal the

engineer and let him take his sweet time about it? A. He is getting paid to look out for those things.

Q. Because the engineer is getting paid to look out, if you saw
were going to run over him you wouldn't turn that at all; you would put it up to the engineer? A. It is up to him.

No, I don't think that is what I did this time. The emergency was not applied from the angle cock. I don't know whether
171 Brewer ever signalled the engineer or not. He may have signalled him after we ran over the fellow. If he signalled him before the engine passed entirely over his body I didn't see him. I was right there. He did not run around by me and look over on the east side to see whether the man passed with the light or not. He didn't do that that I know of. When he ran around me and looked on the east I don't know whether or not he said "we caught him." He didn't go around east of me. He didn't poke his head around east of me. I never did see Brewer signal the engineer until after the rear footboard that we were on had passed over the body of Seale. I guess he gave him a stop signal then. He just flagged him. That is all there was to it. I don't know how the engineer took it. He just flagged him. He never did give him an emergency signal that I saw. I saw the signal he did give. I saw him give a stop signal. After he gave him that stop signal I suppose the engine went half an engine length before it stopped. I didn't measure it. I don't remember whether Brewer was on the ground or on the footboard when he gave this stop signal. We had already passed over Seale. I don't remember whether Brewer hollered or not. I don't think I heard Brewer say anything at that time. I jumped off the footboard then. I jumped out towards the middle of the track. Brewer jumped off too. I think he got off too. I don't remember whether Brewer signalled the engineer after he jumped off or before. My best judgment is that he must have flagged him as he got off; flagged
172 him as he jumped. He could do that very easy. He isn't very far in the air. All you have got to do is step off. An ordinary stop signal is like that. An emergency signal is up high.

H. S. EMMERTON, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Mr. HEAD:

My name is H. S. Emmerton. I work for the Frisco road and worked for them in January, 1909. I was working in the capacity of brakeman. I remember the night Mr. Seale was killed. At the time the accident occurred I was in caboose 395. That was the caboose of the train that was just coming in from the north at the time the accident occurred. Our train was on the lead track; what they call the lead up there. We headed in on about track seven; I am not certain; it was about number seven.

Q. That would be what direction with reference to the coal chute?

A. About half way down the trestle work I should judge; just about the middle of the trestle work.

Q. Well about how many tracks east of the coal chute?

A. (No answer.)

Q. I don't mean the lead, but the track you were heading in off of the lead?

A. All the tracks lead off from the lead.

Q. I want to know how many tracks east of the coal chute was number seven?

A. Well all the tracks lead off the lead and they number on down there eight, nine, etc.

173 Q. What direction do you call the lead?

A. You mean what direction the lead runs there?

Q. Yes.

A. Well, I don't just exactly know the direction.

Q. Say that it runs northeast and southwest?

A. That is what I should judge it is. I never was exactly able to get those directions straight.

Q. Assuming that the lead runs northeast and southwest and that the tracks go off south from the lead, now I want to know how many tracks east of the coal chute is that track No. 7 or the track you were coming in on?

A. Well it is about three I think.

My train on this trip came from Madill, Oklahoma. Well, we started from Sherman and went to Madill and came back. We had brought the train in from across the river. We always get the train across the river. I don't remember whether or not we picked up any car at Denison or any freight at Denison and brought it to Sherman. It was usual on that run for us to pick up freight and bring it to Sherman. That was our business. It depended on what was there as to what amount of freight we picked up at Denison as a rule. As a rule we picked up one or two cars and the balance of it we would bring over from Oklahoma. I don't remember about how many cars were in our train that night. I should judge there were fifteen cars in the train. At the time the accident occurred I was riding in the door of the caboose on the right hand side. It was a side door. The train was drifting down the lead and on into one of those tracks, I think No. 7, somewhere about there, and I was standing in the right hand or west

174 door, side door, of the caboose. I saw a light come out of the freight house door, north door there, which was moving rather fast and started across east and under the coal chute; just came out there in time to make connection with the switch engine as the switch engine came out of one of those tracks. I saw a light come out of the door in the north end of the shed and go in an east or northeasterly direction towards the track the switch engine was one. They just made a good meeting point there you might say; looked like it might be a man intending to get on the footboard of the switch engine. It looked like it might be some one intending to swing on to the front footboard of the switch engine. The light was moving rapidly. I think I have had occasion to observe the movements of the lights about the yards so that I can tell from the movements of lights whether a person

is walking or running. From the movement of that light I judge that the party was running. It was dark. I just saw the light. I couldn't see the party at all. I saw the light when it apparently came out of the office door. At that time it looked as though it just—there were a couple of steps there and looked like instead of going down the steps it just cleared the steps as a person kind of running out the door and jumping off on the ground. He came out of the office with a jump and then circled toward the track. I should judge the *door* to that little office is about three feet high.

Cross-examination by Judge Wood:

The steps are three or four feet high. I never paid any particular attention to them. They *They* are not so awfully
 175 high. I judge they are about three or four feet high. I have gone up them many a time. I am testifying from what I judge they were from actual knowledge. I am willing to put it as three or four feet. I never saw any man at all. It was dark. I never saw the resemblance of a man but I saw a light. I saw a light take a flight in the air that indicated that it went from the top of the floor there to the ground, apparently. If the steps were three or four feet high a man would not necessarily have to jump four or five feet to clear that. He would have to jump about three feet, something of that kind, to clear it. I don't know whether or not it is correct that he would jump three feet to clear a four foot step. I never told Mr. Head that the light circled around there. I never said it circled. From where I was I could not tell whether it went northeast or not. I didn't say anything about the fellow jumping out the door. I saw the light. I am speaking of what I saw. I was in the caboose. The caboose was coming into the yards on the lead north of the coal chutes. I judge I was two hundred and fifty or three hundred feet from this light when I first saw it. I was a little northeast of it. No it was not a whole lot northeast. We were not coming into the east yards. We were coming in what is known as the old yards. We were east of the coal chutes. We were getting down the track right next to the coal chutes, east of it, of this trestle extending down there. That was not between me and the light. I just had a clear vision. It is thirty or forty feet from the office straight across under the coal chute to the track that the train was pulling in on. It is about four feet from the office to the
 176 west rail of the first track east of it. The track is five feet wide. There are two tracks there but they run together right at a close point there. They come together even with the office there. Then there is the coal chute and trestle there and this track was just beyond the coal chute. When I saw the light the caboose was up about three hundred feet from parallel with this office; two hundred and fifty or three hundred feet; the distance was just about the same from one place there that it would be from the other I should judge. I was two hundred and fifty or three hundred feet up this way. I was just standing in the do-r way, side door. The movement of this light drew my attention to it because it was going faster than ordinary. There is a difference between a

man walking and moving faster than that. I very seldom ever saw a switchman run. I have seen a man run with a light. (Witness laughs). No this not a funny proposition, running over and killing that fellow. That isn't what amuses me. I never took my eyes off of the man that came out with the light until I saw the light disappear. I couldn't tell how fast that switch engine was running. I had no way of telling. My train was running very slow; always pull in very slow. It was running about two miles an hour. Bob German was in the caboose with me. He was the conductor. He was standing in front of me, a little inside. He was standing inside of the caboose a little in front of me. I could not say exactly what he was doing. There was not any body else in the caboose that I remember. They did not get my statement that night. It
177 was some time after that I expect before the railroad company got my statement about this case. I should judge it was two or three weeks before they got my statement. I went over there to where the man was killed. He was dead when I got there. It was about five minutes after I saw the light disappear before I went over there. The man was lying between the rails when I got there. He was moved while I was there. He was dead when I got there.

D. B. SNYDER, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Mr. HEAD:

My name is D. B. Snyder. In January, 1909, my occupation was registering way bills for the Frisco in North Sherman. On the night of January 16th, 1909, my work was for the Frisco in North Sherman office. I had a desk there in the office. I remember Mr. Seale's coming into the office on the night of the 16th before he was killed. He came in and brought some messages in and laid them on the train clerk's desk and went on out to catch a train; went on out towards the yards to catch a train. He came in pretty fast and went out in a hurry; seemed to be in a hurry. If he said anything I didn't hear him. I couldn't judge the time that he was in the office; just fast enough to come in and lay the message down and go right back out. He was going to catch the numbers on a train that was coming in. He was going out to catch the numbers on that train that was coming in from the north. That was
178 his business, to take the numbers of the cars of the trains as they came in and went out. The train is No. 35. I don't know that it came in as 35 that night. 35 is a fast merchandise train. They had come from Madill to Sherman.

Cross-examination by Judge Wood:

I saw him come in with some messages. He handed them to Mr. Winslett, the train clerk. Seale was known as yard clerk, working under Winslett. I did not hear him say anything. I know what he went out for because I saw the train coming in. The train was not in at that time. It was just coming over the hill; just getting

down in the yards when he went out. The engine was up in the yards some distance when he went out. *The engine was up in the yards some distance when he went out.* The engine had not pulled in. The front end of the engine hadn't got into the yards when he left. I saw the engine; saw the train. It was his duty as yard clerk to go out there and get the numbers on that train and bring them back to the office. He left the office fast and came in fast. I never heard him say a word that I remember of. There are two steps to that office I think; about six inches to a step. It was just about half a minute after he went out before I saw him again; maybe less than that. I went to where he was. I found him between the tracks, track that comes up from the coal chute. I don't know what number that is. I don't know just exactly how far he was north of the north side of the office I was working in. It was about fifty feet. I don't know just where the switch engine was that ran over him. It was up above there some. I didn't
 179 notice how far; don't know how far up above. Seale had gone to work that night at seven o'clock. It was something before eight when he was killed; I don't know just the exact time. I did not see his lantern when I got out there. He appeared to be dead to me. He was not out there long before we took him in the office; just as quick as we could get him in there. I don't know how many cars were in that train that was coming in. I don't know about how many it usually carries.

Redirect examination by Mr. HEAD:

I said there were about two steps to the door. I don't remember just how many. I mean there would be two steps besides the floor of the shed. There is a landing and then two steps besides the floor of the shed. I said Mr. Seale was going out to take the numbers of the train that was coming in. There was not more than one train that was coming in at that time; just one train coming in from the north.

R. T. CRAIG, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Mr. HEAD:

My name is R. T. Craig. In January, 1909, my occupation was yard clerk for the Frisco at the North Sherman yards. I remember the night Mr. Seale was killed. I was in the office at the time. At that time Snyder and Mr. Winslett were in the office as far as I can remember, and myself. I believe that was all. Mr. Seale came
 180 in the office before the accident and delivered some messages to the train clerk and went back out then to catch this train that was coming in at eight o'clock from the north. There was not more than one train coming in at that time that he went to catch the numbers of. One was all. As he went out and as he came in he was walking pretty fast. I don't remember whether he said anything or not.

Cross-examination by Judge Wood:

I saw him come in with the messages. He delivered them to Mr. Winslett, the train clerk. Mr. Winslett was over him. He was under Winslett's directions. He got those messages from the telegraph office on the east side of the yards. That is a way over next to the H. & T. C. track. I don't know exactly the distance that is from this little office in the west yards where we all worked. My best idea of it is that it is three or four hundred feet. In coming from that place to this office you go under the coal chute incline and in going from the office in the west yards to the east yards you go the same way,—under the incline to the coal chute. No, I can't say that I heard him say anything when he came in. I don't remember his saying anything. My desk was on the east side of the office about middle way between the south end and north end. Winslett's desk was on the south side, kind of in the southeast corner. His fronted on the east too and was near the south wall. There was another desk in there on the east on the north side. That was Mr. Snyder's. Seale came down to the southeast corner to Winslett's desk and delivered the messages and turned and walked out. He was walking

181 rapidly; walking pretty fast. He came in the same way.

It wasn't but just a few minutes after he left the office before I saw him again. Mr. Brewer, the switch engine foreman, came into the office and asked who it was that had left the office and said that they had run over him. I didn't go out then. I never went out to where he was at all. They brought him in the office where I was. Brewer asked who went out with the light and someone told him; told him it was the yard clerk. I suppose I heard the switch engine as it passed by. They are passing there all the time. No, I can't say that I recollect this particular instance. I wouldn't say whether it was ringing the bell or blowing the whistle as it passed there or not. I have heard them ring the bell and blow the whistle when they passed there. I have heard them ring bells and blow the whistles when they are passing between the office and the coal chutes; heard them ring bells. I had been working there something like a year at that time. I can't say how often I heard them ringing the bell when they were passing up and down that track there between the coal chute trestle and the office. They might ring the bell going either way, going down in there or coming out from the 'Y'; going into that place or coming out from down below.

Redirect examination by Mr. HEAD:

I don't mean to say that they always ring the bell. No, I can't say that I have noticed those things particularly. I have noticed them ring. Sometimes they ring and sometimes they don't I can't

182 say whether it is a road engine or switch engine that rings. I don't know.

It is agreed that the witness Snyder was mistaken in calling the train which was coming in from the north and which deceased was going over to take the numbers on when killed the through mer-

chandise train or No. 35, and that his testimony may be changed to say that it was the Madill switcher, and if he were recalled he would testify it was the switcher.

WILL WINSLETT testified for defendant by deposition as follows:

Answers to Direct Interrogatories.

My name is Will Winslett. I live in the City of Dallas, Dallas County, Texas. My age is thirty-one years and my occupation is that of ice dealer. I left the employ of the defendant about the 4th of February, 1909. My occupation during the month of January, 1909, was that of night train clerk for the Frisco Railway company at Sherman, Texas. I lived at Sherman at that time.

I remember the occurrence of the death of M. T. Seale as inquired about. I saw the body of M. T. Seale a few moments after he was killed. The body was about twenty feet north of the office, that is, the North Sherman Yard Office, and was on the first track west of the coal chute incline track. The body was between the Y switch stand and the office and about twenty feet from the office, but I do not know the distance from the Y switch stand to the body, nor to the office from the said stand.

183 Seale was yard clerk working under me. He went to work under me at seven o'clock on the evening he was killed. That was the first work he had done under me at all. He was promoted from a freight trucker to yard clerk. I first knew that Seale was to be promoted about two days before he came under me, and at the time he was first placed in day service to become acquainted with the yards.

He told me about two days before he was promoted that he was going to come on as night yard clerk with me, and I told him I would be glad to have him, but said to him, "Seale, you be awful careful and do not let an engine slip upon you; be sure to look both ways to see if an engine is coming." I told him that while one engine was popping off steam that another one might slip up on him and he could not hear it. I told him he would have to use his eyes as well as his feet. I also cautioned him again on the night that he came on duty with me. The last conversation testified about occurred in the office on the night he went to work. It was a part of my duties to caution a new man about dangers of the positions.

I have answered to Fourth Direct Interrogatory about that I did on two occasions instruct and caution Seale. The two conversations testified to above comprise the only times I ever cautioned Seale; once before he was placed under me, and then on the evening that he took his position under me.

I have refused to attend trial in person as a witness for defendant because I felt that I could not afford to neglect my business to
184 attend the trial. At the time I refused I was in the fuel business and could not get away without great financial loss to me. The defendant and I are all right, but I and the chief clerk had some trouble and I resigned because of that, and I do not feel unkindly toward the defendant.

Answers to Cross-interrogatories.

I do not remember the names of any persons, except Rob Craig and Dave Snyder, who heard my cautions to Seale. Craig and Snyder were present and, I am sure, heard what I said on the last time I cautioned him, and at the time he appeared to go to work. At the time I first cautioned Seale and before he reported for duty, about two days, several truckers were present but I do not know who they were now. T. A. Shearer was present, but I do not know whether any one but Mr. Shearer heard what I said. Both Shearer and I were talking to Seale.

I think Seale did his first work as yard clerk, along, on the night he was killed and about the hour indicated. He was killed somewhere about 7:45 p. m. on the night he was first placed on duty as night yard clerk.

It is a fact that Seale was, at the time of his death, what is known as "night yard clerk," and I was what is known as "night train clerk." Seale was subject to my control and direction. My duties as night train clerk at the time and place was to see the way bills from conductors and deliver all way bills to out bound conductors and write up all way bills covering car-load lots. I had to mark
185 the switch list and make out the cards for the yard clerk to tack on cars showing where the cars were to go. I had to make out telegraph report of all red and green ball freights coming into Sherman as its destination and on all going out of Sherman. The duties of Seale at the time was on the arrival of trains to get the initial and number of all cars on the train and get the seals on both sides and the end of the cars, both on the in and out bound trains. Seale also had to check over my train book and compare and if correct, place his seal thereon. He also had to take messages to and from the telegraph office, across the yard, to the yard office.

It is a fact that I performed my duties in the little office north of the transfer sheds and west of the coal chute. The office had two doors, one in north end and the other in south end. There were five windows in the office, two on the east and two on west and one in north end. The office was about three or four feet from the northeast corner of the office, about as close to the office as trains could run without hitting the office. The Y track was about eight or ten feet from the office and on the east side.

Bob Craig, whose duty was that of utility man, helping all and was called "Red River Clerk" and Dave Snyder, whose duty was that of merchandise clerk, were also working in said office on the night that M. T. Seale was killed.

When I went to work Seale was in the office. He first took his lantern and left office and was out until about 7.40 p. m. when he returned from the telegraph office and handed me a bunch of
186 messages, and I asked him where he had been and he told me he had been at telegraph office. Before I finished looking over the messages a train "whistled in" from the north and Seale grabbed his yard book and lantern and said "I'll have to catch this train" and left the office in a run.

I did not tell Seale to go to telegraph office for messages. However, it was the duty of Seale to go first for the messages. I have answered the balance of this question in reply to cross interrogatory No. 6.

It is not a fact that he handed said messages to me and said "a man is coming in from the north and I will go and catch him" and he did not immediately go out of the north door of said office with his lantern. Seale was in the office about five minutes, during which time I was looking over messages, before he said "a man is coming in from the north and I will go out and catch him." He did (not) immediately leave out of door after making the remark, but was in office at least five minutes before he stated he would go to catch the train. I understood him to mean that a train was coming in and he was going out to get the initials of the cars and the seals and the number of cars in train and seals on each door and window of the cars. I heard the train whistle four long whistles and immediately after the whistle Seale made the remark, or something like that stated in interrogatory. He did mean that a train was coming in and that he would go out and get the number of cars therein.

I never saw Seale alive after the occurrence asked about. I did hear of his getting struck. Mr. Brewer, foreman of north lead switch engine, came to my office and asked me who ran out of door with lantern, and the conversation stated in sixth cross in-
187 terrogatory above, was had. (Portion of answer to 6th cross in parenthesis 2-2, heretofore excluded, was offered and went in without objection). In about three minutes Mr. Brewer, foreman of the north lead switch engine, came into the office and asked me who that was that went running out of the door with a lantern, and I told him it was the new yard clerk. He said "come out and get him." I asked him if he was hurt and Brewer said he thought the man was dead. Seale left going out of the door north.

11th Int. Is it not a fact that three or four minutes after deceased left your office that engine foreman Brewer came into the office and said to you, "Will, who was that went out of here with a lantern?" and you replied "Seale, why?" and did not Brewer then say "come out and get him," and did you not reply "is he hurt?" and did not Brewer answer "yes, I think he is killed?" If that is not the way the occurrence took place, please state it.

Answer. Something very much like the statements of the interrogatory occurred, except that no names were called by either of us.

I immediately went to the place after I heard that he was hurt. Dave Snyder, Bob Craig and myself, who were the only persons in the North Sherman office at the time, went together to the place where Seale was. I did find the body. It was dead. I saw only one wound and that was on his head and had the appearance of being crushed. He was about twenty feet northeast of office and on Y track.

13th Int. If you shall say he was dead when you found him, is it not a fact that he was lying about thirty feet north of the
188 office door and between the rails of the first track east of the office, and is it not a fact that he was doubled up with his face to the north?

Answer. It is a fact that he was laying doubled up with his head to the west and his face to the north; as for the other suggestions, it is not true, as I recollect.

The body of deceased was brought into the office after it was found that he was dead and a doctor was called. It looked like he had been rolled over, but did not look as though it had been dragged. There were several switchmen standing around there but I do not remember their names. The switch engine was standing thirty or forty feet north of the body when I went out after the body.

I do not know whether the engine whistled or not as it backed north at the time that it ran over Seale at any time from the time it started backing until it ran over deceased. I do not know whether or not the bell was ringing. It is a fact that there was an engine standing near popping off steam and making a great deal of noise at said time.

19th Int. Is it not a fact that where you found Seale's body was on a direct line from the door of the office to the trestle under the coal chutes leading to the east side of the yards? If not on said line of travel, how close to it?

Answer. The body was more on a diagonal line from the door, and was about six or eight feet from the trestle.

189 It was the duty of the deceased, M. T. Seale, to go from said office to this incoming train and take the numbers of the cars therein and report back to the office.

Going from the door of said office in the northwest corner thereof to the place where I found the body of said deceased, the switch engine as it backed up from the south would be to his side and a little to the rear of Seale as he went across.

It is a fact that the claim agent came and took a statement from me, and it was about an hour and one-half or possibly two hours after the accident before he got to me for a statement.

I worked for defendant until about the 4th of February, 1909, after M. T. Seale was killed. I voluntarily quit the company. The company desired to lay me off ten days and I resigned in preference.

The first time the defendant's claim agent approached me, at Dallas, I told him I would come to Sherman, Texas, and testify in this case, but later I declined to do so and have and do now decline to come and testify in person. I have not been furnished with transportation for the purpose of coming to Sherman, Texas, to testify.

I have not seen the statement that I made to A. G. Morrison, defendant's claim agent, on the night M. T. Seale was killed since the night I made it. I have not seen a copy. I have not made any other written statement to the defendant, or its agents or attorneys, except the one that I made on the night deceased was killed.

Deposition taken on May 10th, 1910.

190 Judge Wood: Let the record show that this case went to trial on May 9th, and the deposition was returned to clerk on May 11th, during the pendency of the trial.

A. T. GRIBBLE, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Mr. HEAD:

My name is A. T. Gribble. I am chief clerk for the Frisco at the north yard. I have been working for the Frisco six years in July. I was raised here in Sherman. I remember the occurrence of Mr. Seale being killed. I was chief clerk at that time. He was yard clerk working under me in the yard. He was under me. Prior to the occurrence of his death I had a conversation with Mr. Seale with reference to his employment. I gave him a position. I promoted him. He had worked on the platform prior to that time in the transfer work. I had a conversation with him with reference to the position to which he was to be promoted. When I gave him the place on the platform I told him that I would give him something better just as soon as I could; just to go ahead and work and the first thing that showed up I would give him a better place. I told him what the work was and told him to be careful. One thing we have got to do is to get up between cars catching end windows, catching seals on them, yard clerks, and I cautioned him to be careful about that, when he got up to always hold on; not to just jump up in there because it was liable to cause him trouble.

191 One thing I remember cautioning him about was about going around cuts of cars. I always caution all yard clerks about that. Where there is a cut of cars standing in the yard on a track most any body in going around those cars will just walk right in front of them right up against the draw bar in getting around and every body that goes to work I always caution them in walking around cars to always walk below the car and around four or five feet in case a car will come against the cut or engine come against the cut; in that case the car jumps forward and is liable to knock a person down and if the car would go any distance would be liable to kill them. That is the proper way to go around those cars; get a sufficient distance from the cars so as to be safe. I am supposed, or the man who works in my position is supposed to caution men who work in the yard in regard to being careful in their work. There is more or less danger in doing the work of Mr. Seale's position and being about the yard. The duties of my position call upon me to stay in the north yards. That is my work is done in the north yard. The office is located in the northwest portion of the yard. The office is at the north end of the transfer shed between tracks twelve and thirteen. My office is in the office near the place of this accident. That is track twelve that runs by the east side of the transfer shed. The next track east is the 'Y' lead. The switch right there by the office is the switch between the 'Y' lead and number twelve. The frog of that switch is just about opposite the corner of the office, northeast corner of the office. The frog is the point where the east rail of number twelve crosses the west rail of the 'Y.' I don't believe I have got the actual distance from
192 the northeast corner of the office to the switch stand of that switch. I have got the distance from the office, from the

north wall of the office, to the switch stand. That is fifty-four feet. I made this memorandum by actual measurement. It is practically the same distance as from the northeast corner. The office sits that way. The shed is just exactly the same width as the office. The frog of that switch is about opposite the northeast corner of the office. It is four feet from the northeast corner of the office to the first rail of number twelve track. It is eight feet to the west rail of the 'Y' track. The standard gauge of the track is four feet eight and one-half inches inside measurement; five feet from outside to outside. It is eight feet from the corner of the office to the west rail of the 'Y' track. Then that would be thirteen feet from the corner of the office to the east rail of the 'Y' track. I know the point where the blood was found after Mr. Seale was killed. It is forty-two feet from the northeast corner of the office to that point. The switch stand is fifty-four feet. That would be twelve feet south of the switch stand. I made some tests there or observations to ascertain how far an engine can be seen down the 'Y' track from various points west of that track and north of the office. About eighteen feet from the office, north of the office, and ten feet from the track you can see one hundred yards down the track, straight down the 'Y' track. Eighteen feet from the office and ten feet from the 'Y'

193 track you can see a hundred yards down the track. That would be in a northwesterly direction from the track, this way. That would be straight out from the track; right angle.

I mean straight out from that track ten feet and eighteen feet north of the office you can see a hundred yards down the 'Y' track. Twelve feet from the track you can see seventy-five yards. That is the same distance north of the office; eighteen feet. Eighteen feet north of the office and twelve feet from the track you can see seventy-five yards south down the 'Y' track. Forty-two feet from the office north, which would be about opposite where I understood the blood was found, and twelve feet from the track you can see one hundred feet down the track. That takes you down the 'Y' track just about to the end of the coal chutes. Nine feet from the west rail of the 'Y' track on a direct line from the office to the chute you can see clear down to the round house. That is, you can see just as far as the tracks go. That includes that 'Y' switch stand. I know how far that point would be north of the office. That is nine feet from the end of the office. That is nine feet from the office and nine feet from the track. Nine feet from the north wall of the office and nine feet from the west rail of the 'Y' track you can see clear down to the round house. In coming out of the office we all cross at that line I spoke of going into the yards. That is the usual way of going over into the east yards from the office. A person coming out of the door in the north end of the office and going along that usual way to the east yards, nine feet before they reach the west rail of the 'Y' track they can see clear on down the

194 'Y' track to the round house. Twelve feet from the west rail you can see fifty feet down the track on the same direct line. Twelve feet before you reach the west rail you can see a point fifty feet down the track. That is this side of the main coal chute.

READING BOTH FROM AND TO STATIONS ON OTHER LINES.

_____ RAILROAD TO _____ RAILROAD
(MAKING WAY-BILL) (RAILROAD ON WHICH WAYBILL TERMINATES)
 _____ STATION, AND _____ THE _____ RAILROAD
(RECEIVED FROM OR DELIVERED TO) (NAME OF CONNECTING RAILROAD)

OR THE QUARTER MONTH ENDING _____ 19____

[illegible]

2270-1000

AT AVONDALE, N.Y.

NOV 10 1900

11 1900

NOV 10 1900

At that distance you would just see the 'Y' track down there just fifty feet; couldn't see the coal chutes from that point. That observation was made from the west rail, that twelve feet back, just see the east rail fifty feet.

I would have a pretty good idea of the amount of freight handled there at the north yard. We get up statements each month showing. I have charge of that, or have connection with it. I figure all the tonnage statements showing the amount of each class of freight commodity and destination. I suppose ninety-eight per cent of the business we handle there in those yards is interstate business. All northbound trains from Sherman go over Red River into Oklahoma. Trains coming from the north into Sherman come from Oklahoma. There is very little business originated at Denison, southbound business. There is one small siding between Denison and Red River. That is Adams. We don't receive freight there. I don't suppose there would be four cars of stuff a month coming from Denison into our yards. The number of cars of merchandise that comes in from the north depends on the season of the year. When business is good we handle possibly two hundred loads a day from the north and higher than that. Just at this time business is not heavy and we handle about eighty to a hundred loads I suppose. It is not about the same northbound. Our northbound business is not as heavy as our southbound business. When train comes in

the conductor will turn in a switch list that will be copied into what we call the train book. We have four train books,—inbound on the north and inbound on the south and outbound in both directions. And the yard clerk gets the seals and we check up the train. Mr. Winslett copied the numbers into the train book at the time of this accident. He would copy that from the conductor's switch list. That is done on all trains. It is part of the regular and permanent records of my office. That is done in the regular course of the business out there. From my experience with those records they are correctly kept. The yard clerk catches the numbers as a train comes in and then he checks his numbers against the conductor's numbers to see if there is any error and if he has a number that the conductor hasn't got, if there is any difference in the number, they go to the way bill then and straighten it out in order to get the correct car number for the car accountant.

Mr. HEAD: We offer this report of Conductor German's train on that night, No. extra 552, coming in from the north.

(Here follows way-bill, marked page 195.)

196 Cross-examination by Judge Wood:

The company I am working for is a Texas corporation. It is the St. Louis, San Francisco & Texas Railway Company. It is incorporated under the laws of the State of Texas. Its principal office is at Fort Worth. The deceased M. T. Seale was working for the same company at the time he was killed. As I understand it the Frisco of Texas starts at the River, that is, St. Louis, San Francisco & Texas. I don't know about whether what is known as the St. Louis & San Francisco Railroad Company doesn't come into the state. At any rate it doesn't come into Sherman. The St. Louis, San Francisco & Texas Ry. Co. extends to Red River on the north. That is the limit of it. North from the River the St. Louis & San Francisco Railroad Co. is connected with it. I think that is correct. Our department is paid by the St. Louis, San Francisco & Texas Ry. Co. there at the yards. Seale was paid by the same department. I am working for the St. Louis, San Francisco & Texas Railway Co. I am not sure about whether or not it denies it is agent or partner or in any way connected with the St. Louis & San Francisco Railroad Co. What I mean to say is that we handle all freight that comes in the yards hauled by the St. Louis, San Francisco & Texas Ry. Co., whether it comes off of the St. Louis & San Francisco or any other road; whether it is local shipment of through shipment doesn't make any difference. We handle freight that comes into the yards with-

197 out distinction as to where it is from. I have been working for the St. Louis, San Francisco & Texas Ry. Co. six years in July. I don't know how long it has been established in Sherman. I didn't go to work about the time it came here. It will be six years next July that I have been working there. I hold my appointment under the local agent there, Mr. S. E. Peacock. I report to him. He has charge of the office out there. The yardmaster has charge of the yards. The yardmaster is not subject to Peacock too. It is just the freight handlers that are subject to Peacock, transfer sheds and all. I am what is known as chief clerk at the yard office under Peacock. Peacock has got me out there to superintend the work. He comes out and looks over my work to see that it is done right; directs me in the performance of my work. I have the right to employ and discharge all men in the yards that are engaged in the handling of freight or in my department. Peacock has the power but he puts that in my hands to employ and discharge. He does send a man out there occasionally and does discharge a man occasionally. The real power of employing and discharging belongs to Peacock. I employed Seale. I don't know whether he trucked or not. He was first what we call a breaker on the platform. I employed him at the transfer sheds to handle freight. We have one set of men we call truckers that run trucks. and another set of men we call breakers. They call out the freight and load it on the trucks. We call them breakers, but they are engaged in the same work practically; that is, loading and un-

198 loading cars. When I employed Mr. Seale I employed him for that position first. I told him at that time I would give

him a better job as soon as I could. I don't know how long I had known him at that time. It hadn't been very long. I knew him, knew of him, when he worked for the ice company. He came out looking for a position and I asked him to give me a specimen of his handwriting and he did and I told him I would give him a place as soon as I could and asked him to go out and look at the work. I didn't know his name the day he came out looking for a position. I didn't employ him the day he came out there. It was some time later. I don't remember. I don't remember just exactly how long I had known him when I employed him; don't know about how long; hadn't been very long though. I had known the boy a good while but didn't know his name; just saw him around. When he applied for work I knew him by sight. I didn't employ him when he first applied. I don't know how long it was after he first applied before I did employ him. I can't estimate it. It wasn't a great while. I don't just remember. I was in the office I suppose when I employed him; in the transfer shed office. That was where I did my work. I have a desk in there. I say I suppose it was there. I am not sure of it not positive because I may have talked to him in the yard or some other place. I stated to Mr. Head on direct examination that I cautioned him when I employed him, just before he went on as yard clerk. I remember where I talked to him and cautioned him. I remember the place in the yard where I talked to him. That was before he went in the yard as yard clerk. I don't remember just exactly where it was that I first employed him. I remember cautioning him. He was working on the platform as breaker before I gave him a place in the yard as yard clerk. I said I told Mr. Head on direct examination that I cautioned him when I employed him as yard clerk. When I said I cautioned him I had reference to the time I employed him as yard clerk. I didn't caution him when I employed him as breaker so far as I recollect. I don't know just how long he worked on the platform as breaker before I employed him as yard clerk. When I employed him as yard clerk I was between track- one and two in the north yards, in the north end of the old yards. That is not the east yards. It is what they call the old yards. That is northeast of the coal chutes. I was between track- one and two. It was in the afternoon. I don't remember just exactly what time it was. I think he came out at noon. It was shortly after noon if I remember correctly. There was nobody present at that time. He was working extra yard clerk. He was going to work extra yard clerk at the time. Somebody was going to lay off I think; something of the kind. I don't know how long that was before he went to work. I cautioned him about two matters; one was if he ever went up between the cars at the end doors to always hold on; and the other was that when he went around a standing cut of cars to give it space for fear that the cars might be moved. Those were the two principal things I cautioned him about. I testified that on direct examination. The end door is at the end of a car and it would be between the cars if the cars were together. I don't know

exactly how high from the ground an end door is. You have got to get up between the cars. He would have to get off the ground and climb up the cars and I told him if he did that to always hold on.

Redirect examination by Mr. HEAD:

When he was breaking on the platform I employed him as extra yard clerk to do yard clerk work when a yard clerk was laying off; like a yard clerk wanted to lay off, I could use him. That was after he went to work on the breaker. I don't know how long he was employed before that. I don't know whether he ever did any work as extra yard clerk or not. I think he did. I am not sure about that though.

Defendant closes.

THEODORE SHOPE, being sworn and introduced as a witness for plaintiffs, testified as follows:

Direct examination by Judge WOOD:

My name is Theodore Shope. I live at Denison. I have been employed by a railway company. I have had about twenty-five years of railway experience. I have done all kinds of railroading.

I fired four years, ran an engine about ten years as engineer.
201 I have switched some and worked as brakeman. From my experience as a railroad man I can estimate with accuracy the distance that locomotives equipped with air brakes properly can be stopped going at certain speeds on certain grades. Supposing a switch engine is equipped with three sets of wheels, all of equal size known as forty-four inch wheels, three on each side of the engine, and the engine is supposed to be a seventy or eighty ton engine, and has two tons of coal in the tank and about 2500 gallons of water, is going slowly up grade not pulling or pushing any load, running five or six miles an hour, properly equipped with air with the air in good working order and the brakes in good working order, by the application of the automatic brake in the emergency it would stop just as quick as you could put it on. It couldn't move at all after the application of air in the emergency. It would stop at once.

Cross-examination by Mr. SMITH:

The rate of speed at which it was going would cut a figure. If it was going at a higher rate it would not be all the same thing. The brakes would stop her but she would slide the rail. It wouldn't go any distance at all.

I am fifty years old. My last railroad experience was just one year ago. That was when I got hurt on the Katy. I sued for damages. At that time I occupied the exalted position of brakeman.

It wouldn't move at all; naked engine wouldn't. Haven & Wood were my attorneys in my damage suit against the Katy. My case has been settled.

202 J. M. CAIN, being sworn and introduced as a witness for plaintiffs, testified as follows:

Direct examination by Judge Wood:

My name is J. M. Cain. I live at Denison and have lived there about twenty-two years. I have had some railroad experience in the locomotive department. I was an engineer about five or six years for the M. K. & T. I did some other kind of railroad work before I was an engineer. I worked a couple of years around the round house. I have had experience in stopping trains and engines by the use of the air, emergency brakes. From my experience I can estimate with accuracy the time it would take to stop an engine or train with the application of the emergency brake if I understand the conditions and surroundings. Supposing there is a switch engine, supposed to be a seventy or eighty ton switch engine, equipped with wheels of the same size, three on each side of the engine known as forty-five inch wheels, and it has two tons of coal in the tank and about 2500 gallons of water in the tank, going slightly up grade at the rate of five or six miles an hour, is properly equipped with air and emergency brake, and the brake is in good working order, by an application of the emergency brake you can stop almost instantly. If the momentum of the engine was sufficient to slide the wheels the friction on the rail would have a good deal to do with it; condition of the rail. On a dry rail at that rate of speed it wouldn't slide the wheel I don't think over three or four inches. In other words, after the application of the air it would stop I think in three or four inches; practically instantly.

203 Cross-examination by Mr. SMITH:

I don't know how far a train would move in one second running six miles an hour. I couldn't tell you that. If the engineer was in the cab looking out the window for a signal, if he saw the man the first motion he made it would take two or three seconds to receive the signal and apply the brakes in emergency. From the application I think the brake would be set in a second; almost instantly; I would not say just how long. It does take some little space of time of course. I would say about four seconds, something like that, from the time of receiving the signal. Of course I couldn't estimate just what time it is. Of course there is a difference in the motions of men. The fact that he was working steam would cut a figure in the matter. It could go farther working steam. The proper practice would be to cut off his steam in applying the air. That would take a little time. The only thing that would move it after the brake was set would be the momentum. I never figured out how much momentum a seventy ton engine would have going six miles an hour. It would not move any distance after the brake was set if you applied it in the emergency. The emergency application with the brake properly equipped will just lock the wheels. The pressure in an ordinary train line is seventy pounds. In a service application you reduce it from six to eight pounds. You reduce it

all, seventy pounds, for the emergency. Twenty-five pounds is supposed to be about the braking power that there is in a service application, but when you use the emergency you use
204 the seventy pounds. In a service application you can use as much or little as you want, but when you have used twenty-five pounds you have got your braking power; get all the braking power you can get from a service application. I am not in the service of any railroad now. It has been nine years since I have been in active service. I was in the service of the M. K. & T. then. I got discharged for a rear end collision. If an engine was running twenty miles an hour, it would be owing to the condition of the rail as to how far it would move with the emergency application. I couldn't tell whether it would move nine inches under the same condition, dry rail, or not. I wouldn't think it would go over that. If it was moving sixty miles an hour I couldn't tell just how far it would go. My best judgment is it would go any where from a foot to eighteen inches. I was a railroad man for twelve years. I have had a head end collision. That happened just by an oversight in the train dispatcher. The trains didn't see each other in ten feet and stop before they hit. The reason they didn't stop is not because my testimony about how quick they can stop is not right. I don't think that is it because we didn't have air at that time. They didn't use air at that time. I was firing then. I have never had a head end collision since they have been using air. I got fired on account of a tail end collision. I suppose I was running eighteen or twenty miles an hour at the time I discovered the caboose on the track. When I discovered they were on the same track I was on I was
205 maybe a hundred yards from them. I couldn't make a stop in a hundred yards in my case, running eighteen or twenty miles an hour; not where I was. You can't stop a train of cars quicker than you can an engine if you have got a full train of air. You can't stop a train as quick as you can an engine because of the weight of it. You haven't got more power on your train in proportion to the length of it than you have on the engine. You haven't got more braking power on an engine with thirty cars to the weight of the train than you have on an engine without a car and I haven't been taught that from the time I commenced working on a train. I don't know whether that is a fact or not.

Both sides close.

206 I, Sam W. Davis, official stenographer for the District Court of the 15th Judicial District of Texas, do hereby certify that at the request of the Def't St. L. S. F. & T. Ry. Co. I have made up a duplicate statement of facts in the case of Maude Seale, et al. vs. St. L. S. F. & T. Ry. Co., No. 18311 tried in the District Court of Grayson County, Texas, at its April Term, 1910, of which the foregoing is the original; which statement of facts consists of all the evidence introduced upon the trial, both oral and by deposition, stated in narrative form, together with copies made in accord-

ance with the rules of court of all such documents, sketches, maps and other matters as were used in evidence.

Witness my hand this 5th day of August, 1910.

SAM W. DAVIS,
Official Stenographer in and for
15th Judicial District of Texas.

We hereby agree that the foregoing statement of facts prepared by Sam W. Davis, Official Stenographer of the 15th Judicial District of Texas, is a true and correct statement of all the evidence, both, oral, written and by deposition, including all documents, sketches, maps and other matters used in evidence upon the trial of the cause of Maude Seale, et al. vs. St. L. S. F. & T. Ry. Co., No. 18311 in the District Court of Grayson County, Texas, at its April Term, A. D. 1910.

J. H. WOOD,
JAS. P. HAVEN, *Attorneys for Plaintiff.*
HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

207 Examined and approved this 1st day of September, 1910.

Judge Presiding.

I, K. S. Loving, Clerk of the District Court in and for Grayson County, Texas, do hereby certify that Sam W. Davis is the Official Stenographer of the 15th Judicial District of Texas, duly appointed and qualified, and that the foregoing is the original of the duplicate statement of facts made up by him, agreed to in writing by the attorneys of the respective parties, approved by the Honorable B. L. Jones Judge Presiding, and filed with me in the case of Maude Seale vs. St. L. S. F. & T. Ry. Co., No. 18311 in the 15th District Court of Grayson County, Texas, tried at the April Term, 1910, thereof.

Witness my hand and the seal of said Court this 1st day of September, 1910.

[SEAL.]

K. S. LOVING,
Clerk of District Court in and for
Grayson County, Texas.

Filed in Court of Civil Appeals Sep. 16, 1910. Geo. W. Blair,
Clerk 5th District.

208

No. 6368.

ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY, Appellant

vs.

MAUDE SEALE et al., Appellee.

Appeal from Grayson County.

Original Opinion Court Civil Appeals.

Appellee sued the appellant to recover damages for the negligent killing of Memory T. Seale, who was the son of F. H. and J. E. Seale, and the husband of Maude Seale.

A trial was had and a verdict and judgment were rendered for plaintiffs and defendant appeals.

Appellant complains of the action of the court in overruling its second and third special exceptions to plaintiffs' petition, on the ground that said petition did not show that at the time of the accident whether or not defendant was engaged in interstate commerce and whether or not deceased was engaged in handling said commerce.

The proposition submitted by appellant under said assignment is: "If defendant was engaging in the transportation of interstate commerce, and deceased was in its employ in connection therewith at the time he was injured, the cause of action and defendant's liability would be governed by and founded upon Act of Congress passed April 22, 1908, entitled 'An Act Relating to the Liability of Common Carriers by Railroads to Their Employes in Certain Cases,' while if defendant was not so engaged the rights of the parties would be governed by and founded upon the death and assumption of risk statutes and other laws of the State of Texas.

These laws being different the defendant, by special exception, had the right to require plaintiffs to allege in their petition such facts as would enable it to determine which of these laws applied."

We do not think the court erred in overruling the exceptions as stated.

The action was brought under the state law and the petition stated a good cause of action, and was not subject to the exceptions presented. This precise question was passed upon by this Court in the case of *Railway Co. v. Neavis*, 127 S. W., 1090, and a writ of error was denied by our Supreme Court, the holding in said case being contrary to appellant's contention.

The evidence shows that at the time Memory T. Seale was killed he was in the employ of appellant in the capacity of yard clerk in the yards in North Sherman, Grayson County, Texas. While in the discharge of his duties as such clerk he was struck and killed by appellant's servants in the negligent operation of an engine.

The court did not err in charging the jury that deceased had just gone to work as yard clerk for appellant. The evidence shows he was killed at night when he had been at work for the first time in that capacity about forty minutes.

We think the evidence such that the issue of discovered peril was raised and the court did not err in charging on that issue.

210 The trial court refused a special charge requested by appellant, of which it complains, said charge reading: "The plaintiffs in this case are not shown to be the legal representatives of the deceased, M. T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant."

The proposition submitted thereunder is: "The deceased, at the time of receiving the injuries which caused his death, was engaged in interstate commerce, and the cause of action, if any, arising on account of his death is based upon, and controlled by, the Act of Congress approved April 22, 1908, entitled 'An Act Relating to the Liability of Common Carriers by Railroads to Their Employés in Certain Cases,' commonly called the 'Federal Employers' Liability Act,' and not the Texas death statute, which was superseded by the said Act of Congress as to causes of action coming within its terms, and since the plaintiffs have not brought themselves within the provisions of said Act there can be no recovery on their part in this suit."

We are of the opinion that the court did not err in refusing said charge. There was no plea in abatement for the want of capacity in plaintiffs to maintain this suit, which was necessary under our statutes to take advantage of such defects, if any, and which plea should be filed in due order of pleading. Rev. Stats., 1268-1269; Blum vs. Strong, 71 Tex., 328.

211 The statutes of Texas authorize a recovery by plaintiffs as set forth in their petition, and there was no pleading by defendant setting forth as a defense to said cause the Act of Congress, approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroads to Their Employés in Certain Cases," commonly called the "Federal Employers' Liability Act," which Act, whatever effect it may have upon the statutes, cannot be invoked to defeat plaintiffs' right of recovery in this suit, as it was in no way pleaded by defendant. The plaintiffs are the real beneficiaries. The fact that the suit was not brought in the name of some administrator or executor of the estate of Memory T. Seale, deceased, should not prevent a recovery.

All assignments not mentioned herein have been considered, but none present reversible error.

The evidence supports the verdict and the judgment is affirmed.

RAINEY,
Chief Justice.

Delivered June 15th, 1912.

Filed in Court of Civil Appeals Jun- 15, 1912. Geo. W. Blair.
Clerk 5th District. Filed in Supreme Court Jul- 23, 1912. F. T.
Connally, Clerk.

212

Judgment.

6368.

ST. LOUIS, S. F. & T. RY. CO.

VS.

MAUDE SEALE et al.

From District Court Grayson County.

SATURDAY, June 15th, 1912.

Opinion of the Court delivered by Mr. RAINEY, Chief Justice.

This cause came on to be heard on the transcript of the record and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees, Maude Seale, F. H. Seale and J. E. Seale, do have and recover of appellant, St. Louis San Francisco and Texas Railway Company and J. G. Waples and Wm. G. Newby, its sureties upon appeal bond, the amount adjudged below and all costs in this behalf expended and this decision be certified below for observance.

213

*Motion for Rehearing.*In the Court of Civil Appeals, Fifth Supreme Judicial District of
Texas.

No. 6368.

ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY, Appellant

VS.

MAUDE SEALE et al., Appellees.

Motion for Rehearing.

Now comes appellant, the St. Louis, San Francisco & Texas Railway Company, and moves the court to grant it a rehearing and reverse and render this case for the following reasons, to-wit:

I.

The Court of Civil Appeals erred in overruling appellant's first and second assignments of error, and its proposition thereunder, as follows:

First Assignment of Error.

The court erred in overruling defendant's second special exception to plaintiff's petition, as follows: Because the said petition does not show whether or not at the time said Seale was injured he was engaged in the handling of interstate commerce.

Second Assignment of Error.

The court erred in overruling defendant's third special exception to plaintiff's petition, as follows: Said petition does not show whether or not defendant at the time it committed the acts complained of, was engaged with respect thereto in the handling of interstate commerce.

Proposition.

214 If defendant was engaging in the transportation of interstate commerce, and deceased was in its employ in connection therewith at the time he was injured, the cause of action and defendant's liability would be governed by and founded upon the Act of Congress passed April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroads to Their Employees in Certain Cases," while if defendant was not so engaged the rights of the parties would be governed by and founded upon the death and assumption of risk statutes and other laws of the State of Texas. These laws being different the defendant, by special exception, had the right to require plaintiffs to allege in their petition such facts as would enable it to determine which of these laws applied.

II.

The Court of Civil Appeals erred in overruling appellant's third assignment of error, and its proposition thereunder, as follows:

Third Assignment of Error.

The court erred in refusing to give to the jury special charge No. 11, requested by defendant, as follows: You are instructed that when deceased undertook to perform the duties of the position of yard clerk, in the absence of proof, he is presumed to have understood the duties of such position and of the dangers ordinarily incident thereto.

Proposition.

Plaintiff being an adult was presumed to understand the work he undertook to perform and the dangers incident thereto.

215

III.

The Court of Civil Appeals erred in overruling appellant's fourth assignment of error, and its proposition thereunder, as follows:

Fourth Assignment of Error.

The court erred in the following part of the main charge to the jury: The undisputed evidence in this case shows that Memory T. Seale was, at the time of his death, in the employ of the defendant company as a yard clerk, and that he had just gone to work for the said company in this capacity, but had worked for said company previously in another capacity.

Proposition.

The testimony being conflicting as to whether or not deceased had ever worked in the capacity of a yard clerk prior to the night he was killed, and this being a material inquiry it was properly an issue to be submitted to the jury.

IV.

The Court of Civil Appeals erred in overruling appellant's fifth assignment of error, and its proposition thereunder, as follows:

Fifth Assignment of Error.

The court erred in the following portion of Section No. 4 of its general charge to the jury; Again the undisputed evidence shows that one Brewer was a member of the switch crew on said engine and that on said occasion he was riding on one of the footboards of said engine, so if you believe from the evidence that said Brewer saw the deceased, Memory T. Seale, just before he was run over by said engine; and if you further believe from the evidence that it reasonably appeared to said Brewer and he believed that said Seale would
216 probably attempt to cross said track in front of said engine at such time that he would probably be struck by said engine. and that said Brewer realized the perilous situation of said Seale in time, by the use of the means he had at hand, to have avoided the said engine striking the said Seale; and if you further believe from the evidence that the said Brewer failed to use such care in the use of the means, if any, he had at hand to avoid said Seale's being struck by said engine as an ordinarily prudent person would have used under the same or similar circumstances; and if you further believe from the evidence that in such failure, if any you find there was, said Brewer was guilty of negligence, as that term has hereinbefore been defined to you, and that such negligence, if any, was the proximate cause of said Seale's death, then in any of these three events you will find for plaintiffs and assess their damages as hereinafter directed unless you should find for defendant under other instructions given you in charge.

Proposition.

The testimony being insufficient to raise the issue of discovered peril the court erred in submitting the same to the jury.

V.

The Court of Civil Appeals erred in overruling appellant's sixth assignment of error, and its proposition thereunder, as follows:

217

Sixth Assignment of Error.

The verdict of the jury is contrary to, and without sufficient evidence to support it in finding that said Brewer saw said deceased, and that it reasonably appeared to said Brewer, and he believed that said Seale would probably attempt to cross said track in front of said engine at such time as that he would probably be struck by said engine, and that said Brewer realized the perilous situation of said Seale in time to apply the use of the means he had at hand to have avoided the engine striking the said Seale, and that said Brewer failed to use such care of the use of the means he had at hand to avoid said Seale's being struck by said engine as an ordinarily prudent person would have used under the same or similar circumstances and that such failure upon the part of said Brewer was negligence, and was the proximate cause of said Seale's death.

Proposition.

The testimony being insufficient to raise the issue of discovered peril the court erred in submitting the same to the jury, and having submitted it should have granted the eleventh ground of defendant's motion for a new trial.

VI.

The Court of Civil Appeals erred in overruling appellant's seventh assignment of error, and its propositions thereunder, as follows:

Seventh Assignment of Error.

218 The court erred in refusing to give to the jury special charge No. 13, requested by defendant: The plaintiffs in this case are not shown to be the legal representatives of the deceased, M. T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant.

First Proposition.

The deceased, at the time of receiving the injuries which caused his death, was engaged in interstate commerce, and the cause of action, if any, arising on account of his death is based upon, and controlled by the Act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroads to Their Employes in Certain Cases," commonly called the "Federal Employers' Liability Act," and not the Texas death statute, which was superseded by the said Act of Congress as to causes of action

coming within its terms, and since the plaintiffs have not brought themselves within the provisions of said Act there can be no recovery on their part in this suit.

Second Proposition.

The Act of Congress under which the cause of action accrued in this case provides "in case of the death of such employé to his or her personal representatives for the benefit of the surviving widow or husband," and does not give to the widow a right of action, and plaintiffs cannot maintain this suit in their individual capacity, as attempted herein, but same can only be prosecuted by the personal representative of the deceased.

219

Third Proposition.

The personal representatives of the deceased, in the Act of Congress referred to, means the administrator or executor.

VII.

The Court of Civil Appeals erred in overruling appellant's eighth assignment of error, and its propositions thereunder, as follows:

Eighth Assignment of Error.

The judgment of the court in favor of plaintiff, Maude Seale, is contrary to law, and to the evidence in this case, in that the undisputed evidence shows that the deceased, for whose death this suit is brought, was, at the time of his death, engaged in interstate commerce and the right of said plaintiff, Maude Seale, to recover is given by the Act of Congress relating to interstate commerce and to the liability of common carriers to their employés, and no right of action is given for the death to the wife of an employé killed while engaged in such commerce, but is given only to the personal representative of such deceased employé.

The propositions under the seventh assignment of error are adopted under this assignment.

VIII.

The Court of Civil Appeals erred in overruling appellant's ninth, tenth and eleventh assignments of error, which, involving the same propositions, for the convenience of the Court, are submitted together, and its proposition thereunder, as follows:

220

Ninth Assignment of Error.

The court erred in refusing to give to the jury special charge No. 14 requested by defendant, as follows: In no event are the plaintiffs, F. H. Seale and J. E. Seale entitled to recover any sum in this case.

Tenth Assignment of Error.

The judgment of this court is contrary to law and to the evidence in this case insofar as the same is in favor of the plaintiff, F. H. Seale, in that the undisputed evidence shows that the deceased, Memory T. Seale, on account of whose death this suit is brought, was at the time of his death engaged in interstate commerce, and the right of said plaintiff, F. H. Seale, to recover on account of said death is governed by the Act of Congress relating to liability of common carriers to its employes in certain cases, and no right of action is given by said act as to the parents of the deceased in case where the deceased left surviving him a wife.

Eleventh Assignment of Error.

The judgment of the court is contrary to law and to the evidence in this case insofar as the same is in favor of plaintiff, J. E. Seale, in that (1) the undisputed evidence shows that at the time of the death of said Memory T. Seale, on account of whose death this action is brought, he was engaged in interstate commerce, and the right of said plaintiff to recover on account of said death is governed by the Act of Congress Relating to the Liability of Common Carriers to its Employes in Certain Cases, and by the provisions of said Act and of the law applicable to this case no right of action is given to the parent of the deceased in cases where said deceased left surviving him a wife, as said deceased in this case did, (2) the undisputed evidence shows that at the time of the death of said Memory T. Seale and at the time of this trial, said J. E. Seale was and is a married woman, whose husband is a party to this suit.

Proposition.

The Act of Congress controlling the right of action in this case provides "or in case of the death of such employé to his or her personal representative for the benefit of the surviving widow or husband and children of such employé, and if none, then of such employé's parents, and if none, then to the next of kin dependent upon such employé." The deceased, M. T. Seale, left a surviving widow, and the plaintiffs, F. H. Seale and J. E. Seale, have no cause of action.

IX.

The Court of Civil Appeals erred in overruling appellant's twelfth assignment of error, and its proposition thereunder, as follows:

Twelfth Assignment of Error.

The verdict of the jury is contrary to and without sufficient evidence to support it in finding that the deceased, M. T. Seale, on the occasion in question was not going hurriedly across the railway

yard of defendant, and that he did stop, look or listen for the approach of an engine as he attempted to cross said track, or that if he was going hurriedly across said railway yards and did not stop or look or listen for the approach of an engine as he attempted to cross said track he was not himself guilty of negligence.

Proposition.

Though, ordinarily contributory negligence is a question for the jury, where, as in this case, deceased attempted to cross the track immediately in front of a moving engine, with headlight burning, and making the usual noise, without taking any precaution to discover its approach or avoid the same, he was guilty of contributory negligence as a matter of law, even though he had a right to cross the track at the place in question.

X.

The Court of Civil Appeals erred in overruling appellant's thirteenth assignment of error, and its proposition thereunder, as follows:

Thirteenth Assignment of Error.

The court erred in refusing to give to the jury special charge No. 17, requested by defendant, as follows: If you believe from the evidence that at the time that M. T. Seale was killed that he was proceeding from the office of defendant in its yards at Sherman to a train for the purpose of taking the numbers of the cars in said train, and that said train had just arrived in said yards from the north and that the said train was a freight train, and that the freight in said train had been transported from another state into the State of Texas, and was being delivered into the yards of defendant, then you are instructed that at the time of his death that deceased was in the service of defendant, engaged in interstate commerce, and if you so believe, then you are instructed that plaintiffs are not entitled to recover in this case, and you will therefore return your verdict in favor of defendant.

Proposition.

The evidence raised the issue that deceased was engaged in interstate commerce at the time of his death, and the court should have submitted the same to the jury, and if they found such to be the case the rights of the parties to this suit were governed by the Federal Employers' Liability Act, and the court should have advised the jury as to those rights.

Argument.

Since the original submission of this case a number of decisions have been rendered, to which we desire to direct the attention of

the Court, that have peculiar applicability to this case and its facts, and in our judgment, are decisive of many of the questions involved in it. In *Freeman vs. Powell*, 144 S. W., 1033, the Court of Civil Appeals held, in effect, that the Federal Employers' Liability Act entirely governed a case of the character presented by this record in a strong and well considered opinion by the Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District. About June 12, 1912, the Supreme Court of this State refused writ of error in that case, and we take it, thereby passively indicated its approval of the conclusions reached in that case.

224 To the same effect is the decision of *Mondon vs. N. Y. N. H. & H. Ry. Co.*, 223 U. S., 1, where the Supreme Court of the United States construes the Federal Employers' Liability Act.

We take it that these decisions are eminent and controlling authority, and are authority for the proposition that the decision of this case is governed wholly by the proper construction of the Federal Employers' Liability Act of 1908. If this conclusion is correct we submit that it irresistibly follows that appellant's ninth, tenth and eleventh assignments of error are well taken and should be sustained, because clearly, under the provisions of the Federal Employers' Liability Act, the deceased having left surviving him a wife, his parents are not entitled to recover.

On May 13, 1912, the Federal Employers' Liability Act was again under consideration by the Supreme Court of the United States in the case of *American Railroad Company of Porto Rico vs. Ann Elizabeth Birch, et al.* That was a case for injuries resulting in death brought by Ann Elizabeth Birch, and it did not appear in what capacity she sued, nor whether she was proceeding under the laws of Porto Rico or under the Federal Employers' Liability Act, and she was required, on demurrer, and being so required, she declared on the Federal Employers' Liability Act and made besides herself her son a party plaintiff. In that case it is expressly held that the Employers' Liability Act of 1908 in case of injuries resulting in death gives a cause of action that can alone be maintained by the personal representative of the deceased. It was contended there, as it

225 is contended in this case, that the widow and son were the sole beneficiaries, but that contention was overruled and the judgment reversed.

Owing to the recent date of this decision, it not yet having been published generally, we file a copy of that opinion in the papers of the case with this motion. Under this eminent authority we respectfully submit that appellant's seventh, and eighth assignments of error should be sustained.

This is a suit for injuries resulting in death, and we submit that the proposition involved in appellant's first and second assignments of error is not the same proposition that was involved in *Railway vs. Neaves*, 127 S. W., 1090, and *Railway vs. Hawley*, 123 S. W., 726, but the court, in disposing of the proposition that the suit is not brought by a personal representative of the deceased as required by the Federal Employers' Liability Act, gives as a reason for so holding that there was no plea in abatement for want of capacity in

plaintiffs to maintain the suit. We respectfully submit that unless the trial court had sustained the exceptions referred to in appellant's first and second assignments of error that it was impossible to present a plea in abatement. It was for the very purpose of ascertaining if a plea in abatement would lie that these demurrers were presented to the court, but they were overruled. If appellees, suing in their individual capacity, had based their suit on the Federal Employers' Liability Act, doubtless there would be some force in the statement

226 that no plea in abatement was presented, but this court in passing on the first and second assignments, has well stated that the action was brought under the State law, and under that law no plea in abatement could be presented, or would have been by the court sustained. It is our contention that the Federal law, being supreme and controlling in this case, that appellees having based their case on the state law, when it developed that it was governed by the Federal law that the court should have instructed a verdict for appellant, and that the thirteenth assignment of error should be sustained.

Without waiving the other assignments presented in this motion we desire to call the court's careful attention to the fifth and twelfth assignments of error, and submit that upon the whole record there is no evidence of discovered peril, and that under the twelfth assignment that the whole record shows beyond dispute irresistibly that the deceased came to his death by his own want of care.

We respectfully ask a reconsideration of the propositions presented in this case, especially in view of the light of the recent authorities bearing on them, for we believe that such reconsideration will result in the court's reaching the conclusion that this cause has not been tried in accordance with the law, and that the same should be reversed and rendered.

227 That Wolfe, Maxey, Wood & Haven are of counsel for appellees, and reside at Sherman, Texas.

Respectfully submitted,

ANDREWS, BALL & STREETMAN,
HEAD, SMITH, HARE & HEAD,

*Attorneys for Appellant, St. Louis, San Francisco
& Texas Railway Company.*

We hereby accept service of a copy of the above and foregoing motion for rehearing, and agree that the same be submitted without further notice to us.

J. H. WOOD,
JAS. P. HAVEN,

Attorneys for Appellees, Maude Seale et al.

Filed in Court of Civil Appeals Jun- 12, 1912. Geo. W. Blair,
Clerk 5th District. Filed in Supreme Court Jul- 23, 1912. F. T.
Connally, Clerk.

Order Overruling Motion.

5836, 6368.

ST. LOUIS, S. F. & T. RY. CO.

vs.

MAUDE SEALE et al.

SATURDAY, June 22nd, 1912.

This day came on to be heard the motion of appellant for rehearing of this cause and the same being inspected, it is considered, adjudged and ordered that the said motion be overruled.

228

Opinion on Motion for Rehearing.

No. 6368.

ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY, Appellant,

vs.

MAUDE SEALE et al., Appellees.

On Rehearing.

Appellant insists that the facts of this case being *it* within the Act of Congress approved April 22nd, 1908, known as the "Federal Employers' Liability Act," and the same is controlled by its provisions. As said by Mr. Chief Justice Brown, in the case of M. K. & T. Ry. Co. of Texas vs. Glalack, recently decided, "this court has never questioned that the Constitution of the United States and the laws enacted by Congress in the exercise of powers derived from that Constitution are superior to the laws of this on the same subjects." We are of the opinion, however, that the facts in this case do not bring it within the purview of the Federal Statute. The deceased was run over and killed by a switch engine operated in the yards of appellant in Sherman, Texas. He was working under T. A. Gribble, who was chief clerk out at those yards and in charge of the same. Deceased's work was done in connection with the clerks in the yards, and with the switch crew. After a train was brought in, it was delivered to the switch crew. The first act was to obtain the numbers of the cars and make a record of them in the office, then the switch crew began the work of tearing the train up and making new
 229 trains. He got the numbers and initials of each car that came in and went out of the yards. When a train comes in the yards he goes out and gets the number and initials of each car and gets the seals that are on the car doors. Whatever impression is on the seal he keeps in his book that he carries. He gets the number of the train. He gets the cars that are made out for this train according to the conductor's switch list. He puts the cards on the

cars in order that the switchman may switch the train properly. After he does that he goes in the office and checks his list, checks his book in the office with the train clerk and also enters his seals. This is done in order to keep records. A train was coming in from Oklahoma at that time. It was a freight train. The north Sherman yards were the terminal for that train. That is, that was the end of the run of that train. If any trains went south they were made up in the yards, new trains, and sent south, or other trains made up and sent north. The evidence does not show that any of the cars in the train coming in were destined for other points. Such being the evidence this case is not controlled by said Federal Act.

The motion for rehearing is overruled.

RAINEY,
Chief Justice.

Delivered June 22nd, 1912.

Filed in Court of Civil Appeals Jun- 22 1912, Geo. W. Blair, Clerk 5th. District. Filed in Supreme Court Jul- 23, 1912, F. T. Connally, Clerk.

230 *Order of Supreme Court Refusing Writ of Error.*

In Supreme Court of Texas.

ST. LOUIS, S. F. & T. RY. CO.

VS.

MAUDE SEALE et al.

From Grayson County, 5th District.

OCTOBER 16TH, 1912.

This day came on to be heard the application of St. Louis, S. F. & T. Ry. Co. for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been duly considered, it is ordered that said application be refused. That the applicant St. Louis, San Francisco & Texas Railway Company and its sureties J. G. Waples and W. G. Newby pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said court, this the 6th day of November, A. D. 1912.

[SEAL.]

F. T. CONNERLY, *Clerk,*
By J. S. MYRICK, *Deputy.*

Filed in Court of Civil Appeals Nov. 7, 1912, Geo. W. Blair, Clerk 5th District.

231

In the Supreme Court of the United States.

ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY, Plaintiff
in Error,

vs.

MAUDE SEALE et al., Defendants in Error.

Petition to U. S. Supreme Court.

To the Supreme Court of the United States:

Your petitioner, the St. Louis, San Francisco & Texas Railway Company, a corporation incorporated under the laws of the State of Texas, having its principal place of business in the City of Ft. Worth, County of Tarrant, and State of Texas, plaintiff in error in the above entitled cause, respectfully shows to this court that on May 12, 1910, a judgement was rendered in the District Court of Grayson County, Texas, against it for the sum of Eleven Thousand (\$11,000.00) Dollars in favor of Maude Seale, F. H. Seale and J. E. Seale, the same being apportioned as follows: Nine Thousand (\$9,000.00) Dollars in favor of Maude Seale, One Thousand (\$1,000.00) Dollars in favor of F. H. Seale and One Thousand (\$1,000.00) Dollars in favor of J. E. Seale, defendants in error.

Pursuant to the civil statutes of the State of Texas said cause was appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas where, on June 15, 1912, said judgment was affirmed; that afterwards pursuant to the provisions of the civil statutes of Texas a motion for rehearing in said cause was presented to the said Court of Civil Appeals and was by it on June 22, 1912, overruled; that afterwards, and pursuant to the civil statutes of the State of Texas, it filed in the Court of Civil Appeals and caused to be presented to the Supreme Court of Texas a petition for writ of error to review said cause, which petition was by said Supreme Court refused, on October 16, 1912, and the said Court of Civil

232 Appeals for the Fifth Supreme Judicial District of Texas is the highest court of said State in which a decision of this case could be had.

In the said action rights, privileges and immunities were claimed by your petitioner under the constitution and statutes of the United States and under authority exercised under the United States and the decision of the said Court of Civil Appeals was against the rights, privileges and immunities specially set up and claimed under said constitution, statutes and authority, all of which will more fully appear in detail from the assignments of error filed herein.

Wherefore, said St. Louis, San Francisco & Texas Railway Company prays that a writ of error may issue to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas for the correcting of the errors complained of, and a duly authenticated

transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

ANDREWS, BALL & STREETMAN,
HEAD, SMITH, HARE & HEAD,
Attorneys for Plaintiff in Error,
St. Louis, San Francisco & Texas Railway Co.

CECIL H. SMITH,
Of Counsel.

The writ of error as prayed for in the foregoing petition is hereby allowed this 25 day of October, A. D. 1912.

The writ of error to operate as a supersedeas and a bond for that purpose is fixed at the sum of Twenty-Five Thousand (\$25,000.00) Dollars.

J. R. LAMAR,
Justice of the Supreme Court
of the United States.

[Endorsed:] St. Louis, San Francisco & Texas Railway Company, Plaintiff in Error, vs. Maude Seale, et al., Defendants in Error. Petition for Writ of Error. Filed in Court of Civil Appeals, Nov. 5, 1912. Geo. W. Blair, Clerk 5th District.

233 In the Supreme Court of the United States.

ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY, Plaintiff
in Error,

vs.

MAUDE SEALE et al., Defendants in Error.

Assignment of Errors.

Now comes the St. Louis, San Francisco & Texas Railway Company, plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas erred to the grievous injury and wrong of the plaintiff in error, and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

I.

The Court of Civil Appeals erred in holding that Memory T. Seale at the time of the injury, which caused his death, was not employed in interstate commerce, and that the cause of action for damages on account of his death was not governed by the Federal Employers' Liability Acts.

II.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The court erred in refusing to give to the jury special charge No. 13, requested by defendant:

The plaintiffs in this case are not shown to be the legal representatives of the deceased, Memory T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant.

III.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

234 The judgment of the court in favor of plaintiff, Maude Seale, is contrary to law, and to the evidence in this case, in that the undisputed evidence shows that the deceased, for whose death this suit is brought, was, at the time of his death, engaged in interstate commerce and the right of said plaintiff, Maude Seale, to recover is given by the Act of Congress relating to interstate commerce and to the liability of common carriers to their employes, and no right of action is given for the death to the wife of an employe killed while engaged in such commerce, but is given only to the personal representative of such deceased employe.

IV.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The court erred in refusing to give to the jury special charge No. 14 requested by defendant, as follows:

In no event are the plaintiffs, F. H. Seale and J. E. Seale entitled to recover any sum in this case.

V.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The judgment of this court is contrary to law and to the evidence in this case insofar as the same is in favor of the plaintiff, F. H. Seale, in that the undisputed evidence shows that the deceased, Memory T. Seale, on account of whose death this suit is brought, was at the time of his death engaged in interstate commerce, and the right of said plaintiff, F. H. Seale, to recover on account of said death is governed by the Act of Congress relating to liability of common carriers to its employes in certain cases, and no right of action is given by said act to the parents of the deceased in case where the deceased left surviving him a wife.

VI.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The judgment of the court is contrary to law and to the evidence in this case insofar as the same is in favor of plaintiff, J. E. Seale, in that (1) the undisputed evidence shows that at the time of the

death of said Memory T. Seale, on account of whose death this action is brought, he was engaged in interstate commerce, and the right of said plaintiff to recover on account of said death is governed by the Act of Congress Relating to the Liability of Common Carriers to its Employés in Certain Cases, and by the provisions of said Act and of the law applicable to this case no right of action is given to the parent of the deceased in cases where said deceased left surviving him a wife, as said deceased in this case did. (2) The undisputed evidence shows that at the time of the death of said Memory T. Seale and at the time of this trial said J. E. Seale was and is a married woman, whose husband is a party to this suit.

VII.

The Court of Civil Appeals erred in not reversing and rendering the judgment rendered in this case by the trial court.

Wherefore, for this and other manifest errors appearing in the record the said St. Louis, San Francisco & Texas Railway Company plaintiff in error, prays that the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error, granting it its rights under the statutes and laws of the United States, and plaintiff in error also prays judgment for its costs.

ANDREWS, BALL & STREETMAN,
HEAD, SMITH, HARE & HEAD,
Attorneys for Plaintiff in Error,
St. Louis, San Francisco & Texas Railway Co.

CECIL H. SMITH,
Of Counsel.

[Endorsed:] St. Louis, San Francisco & Texas Railway Company Plaintiff in Error, vs. Maude Seale, et al., Defendants in Error Assignments of Error. Filed in Court of Civil Appeals, Oct. 20 1912. Geo. W. Blair, Clerk 5th District.

236 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for the Fifth Supreme Judicial District of Texas before you, one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the St. Louis, San Francisco & Texas Railway Company, appellant in said court, and Maude Seale, F. H. Seale and J. E. Seale, appellee

in said court wherein, was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said St. Louis, San Francisco & Texas Railway Company of Texas as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of October, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

J. R. LAMAR,

*Associate Justice of the Supreme Court
of the United States.*

238 UNITED STATES OF AMERICA, 88:

To Maude Seale, F. H. Seale and J. E. Seale, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas wherein The St. Louis, San Francisco & Texas Railway Company is plaintiff in error and you are defendants in error. to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph R. Lamar, Associate Justice of

the Supreme Court of the United States, this, 26th day of October, in the year of our Lord one thousand nine hundred and twelve.

J. R. LAMAR,
*Associate Justice of the Supreme
Court of the United States.*

We acknowledge receipt of a copy of this citation this November 4, 1912.

JUDSON H. WOOD &
JAS. P. HAVEN,
*Att'ys for Maude Seale, F. H. Seale, and
J. E. Seale, Defendants in Error.*

239 In the Supreme Court of the United States.

ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY COMPANY,
Plaintiff in Error,

vs.

MAUDE SEALE et al., Defendants in Error.

Know all men by these presents:

That, we, the St. Louis, San Francisco & Texas Railway Company, a corporation incorporated under the laws of the State of Texas having a principal place of business in the City of Ft. Worth, County of Tarrant, State of Texas, as principal, and New England Casualty Company, a corporation incorporated under the laws of the State of Massachusetts having its principal place of business in the City of Boston, State of Massachusetts, as surety, are held and firmly bound unto Maude Seale, F. H. Seale and J. E. Seale, defendants in error, in the sum of Twenty-five Thousand, (\$25,000.00) Dollars lawful money of the United States of America, to the payment of which well and truly to be made the said principal and the said surety bind themselves, their and each of the said successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 25th. day of October, in the year of our Lord, one thousand nine hundred and twelve.

Whereas, in the District Court of Grayson County, Texas, on the 12th. day of May, 1910, Maude Seale, F. H. Seale and J. E. Seale,

240 the above named defendants in error, recovered a judgment against the St. Louis, San Francisco & Texas Railway Company, plaintiff in error, for the sum of Eleven Thousand (\$11,000.00) Dollars, which said judgment is apportioned as follows: To Maude Seale Nine Thousand (\$9,000.00) Dollars, to F. H. Seale One Thousand (\$1,000.00) Dollars and to J. E. Seale One Thousand (\$1,000.00) Dollars, which judgment, on appeal, was by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas on the 15th. Day of June, 1912, affirmed, and the above named St. Louis, San Francisco & Texas Railway Company, plaintiff in error, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above case by the said Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

Now, therefore, the condition of this obligation is such that — the above named plaintiff in error shall prosecute this writ of error to effect and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

ST. LOUIS, SAN FRANCISCO AND TEXAS
RAILWAY CO.,

By HEAD, SMITH, HARE & HEAD,

Its Attorneys.

NEW ENGLAND CASUALTY COMPANY,

By JOSEPH F. RANDALL,

Resident Manager. [SEAL.]

This bond approved this 25th. day of October, A. D. 1912.

J. R. LAMAR,

Associate Justice.

241 Filed in Court of Civil Appeals Nov. 5, 1912, Geo. W. Blair, Clerk 5th. District.

Statement of Costs.

Cost in District Court.....	\$257.77
Cost in Court of Civil Appeals.....	106.65
Cost in Supreme Court.....	7.00
Total Costs	\$371.42

242 THE STATE OF TEXAS:

I, Geo. W. Blair, Clerk of the Court of Civil Appeals in and for the Fifth Supreme Judicial District of Texas, do hereby certify that the foregoing 141 pages numbered from 1 to 241 contain true copies of the record of the court below; the original opinion, judgment, motion for rehearing, order overruling same and opinion on motion for rehearing by this court, order of the Supreme Court refusing writ of error, and the bond for writ of error to Supreme Court of the United States, now on file and of record in my office; also the original petition to the Supreme Court of the United States for writ of error, assignment of errors, writ of error and citation, in the case of St. Louis, San Francisco & Texas Railway Company, vs. Maude Seale, et al., No. 6368.

Given under my hand and seal of office at Dallas, Texas, this 18th day of November, A. D. 1912.

[Seal Court of Civil Appeals of the State of Texas.]

GEO. W. BLAIR, *Clerk.*

Endorsed on cover: File No. 23,432. Texas Court of Civil Appeals, Fifth Supreme Judicial District. Term No. 857. St. Louis, San Francisco & Texas Railway Company, plaintiff in error, vs. Maude Seale, F. H. Seale, and J. E. Seale. Filed November 26th, 1912. File No. 23,432.



Office Supreme Court, U. S.
FILED.

MAR 31 1913

JAMES H. McKENNEY,
CLERK.

NUMBER 857.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

ST. LOUIS, SAN FRANCISCO & TEXAS RAIL-
WAY COMPANY, PLAINTIFF IN ERROR,

VS.

MAUDE SEALE, F. H. SEALE AND J. E. SEALE,
DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH
SUPREME JUDICIAL DISTRICT OF TEXAS.

**BRIEF FOR PLAINTIFF IN ERROR ON MOTION
OF DEFENDANTS IN ERROR TO DISMISS
OR AFFIRM.**

W. F. EVANS,
ANDREWS, BALL & STREETMAN,
HEAD, SMITH, HARE & HEAD,

*Attorneys for Plaintiff in Error,
St. Louis, San Francisco & Texas
Railway Company.*

CECIL H. SMITH,
Of Counsel.



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NUMBER 857.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1912.

ST. LOUIS, SAN FRANCISCO & TEXAS RAIL-
WAY COMPANY, PLAINTIFF IN ERROR,

VS.

MAUDE SEALE, F. H. SEALE AND J. E. SEALE,
DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH
SUPREME JUDICIAL DISTRICT OF TEXAS.

COMPLETE STATEMENT.

This suit was instituted in the District Court of Grayson County, Texas, by defendants in error, Maude Seale, F. H. Seale and J. E. Seale, who were plaintiffs and appellees in the courts below, against the plaintiff in error, St. Louis, San Francisco & Texas Railway Company, which was defendant and appellant in the courts below, to recover damages for injuries resulting in the death of

M. T. Seale sustained on account of alleged negligence of plaintiff in error while the said M. T. Seale was engaged in his duties as an employe of plaintiff in error; the said M. T. Seale being the husband of Maude Seale and the son of F. H. Seale and J. E. Seale, defendants in error. The trial of the case in the District Court of Grayson County resulted in a verdict and judgment in favor of plaintiffs, in the aggregate, for the sum of Eleven Thousand (\$11,000.00) dollars; the case was appealed by plaintiff in error to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas where the judgment of the District Court was affirmed; plaintiff in error then applied to the Supreme Court of Texas for a writ of error in the case, which was by that court denied, and it sued out writ of error from this court to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, and brings the case to this court for review.

Pleadings of Defendants in Error.

After alleging the residence of defendants in error in Grayson County, Texas, and that plaintiff in error was a corporation incorporated under the laws of Texas it is alleged:

That defendant corporation did, at the time of the happening of the matters and things hereinafter complained of, and does now, maintain railway yards, round houses, shops and terminals in what is known as North Sherman, Grayson County, Texas, wherein trains, locomotives and cars were and are switched and propelled for the purposes of taking

to pieces and making up trains; said place also being a division point and is maintained and used for the purpose of terminals for trains arriving there and for trains that leave said point.

That heretofore, to-wit: On the night of January 16, 1909, Memory T. Seale, was in the employment of the defendant in the capacity of a clerk known and designated as a seal or yard clerk, and performed his duties at night at said above described railway yards and terminals. That on said day about 7:45 o'clock P. M. he was performing his said duties in said railway yards when defendant recklessly, carelessly and negligently propelled and ran a locomotive against and over deceased, thereby cruelly crushing, wounding and mutilating him to such an extent as to cause his death, within a few minutes after he received said injuries. That said Memory T. Seale, hereinafter known as "deceased," was struck and killed in the following manner, to-wit:

While performing his duties and acting in the scope of his authority, he was on his way from a compartment or building known as a "box car;" which was, among other things, used as a telegraph station and office, situated on or near the east side of said railway yards, with dispatches, messages and papers to be by him delivered to a clerk in an office building maintained on or near the west side of said yards, when he heard a freight train coming in from the north, bound for said yards and terminals, and was told by the night yard master of the defendant, who was then and there the superior of the deceased, to hurry up with his errand and return and check up the incoming train, as it was desired to

make up a train at once to go out of said terminals to the south, and certain cars would have to be incorporated in said train which were then in the train coming in from the north.

That it was then and there the duty of deceased to obey said yard master, and it was then and there his duty to check up said incoming train by obtaining the name, number and designation of the cars of said incoming train, and report the same to a night yard clerk that had his place of business in the office building in the west side of said yards. That after receiving said instructions from the yard master, deceased continued on his way to said office building in the west of said yards, and delivered his dispatches, messages and papers to the night yard clerk therein, and picked up his lantern and started in a northeasterly direction for the purpose of meeting said incoming train, and after he had gotten a short distance from said office, the defendant's locomotive engaged in switching and propelling cars in said yards, backing up from the south, came up behind deceased, and diagonally behind him, and without notice or warning, struck, ran over and cruelly killed him as aforesaid.

That defendant was guilty of gross carelessness and negligence, causing said deceased to be struck and killed as aforesaid, as follows, to-wit: The railway track upon which said locomotive was being backed was just east of the office building heretofore described, situated in the west part of the yards, and was entirely too close to the same; that the door to the same opened to the north at and near the west side of said building, so that locomotives and en-

gines coming up said track from the south were obscured by said office building from the view of the deceased until he was immediately in front thereof; there was no light on the tender of said locomotive as it was backed up said track on said occasion. Said locomotive was running at a very dangerous and rapid rate of speed, to-wit, about 25 miles per hour; that said locomotive had been down south on what was known as the "Y," to leave a car, and was backing north for the purpose of coming on a switch and heading in to the east part of said yards. That when said locomotive was ready to start north, after leaving said car, it blew no whistle and did not ring its bell before starting, nor did it blow its whistle on said locomotive, or ring its bell, from the time it started from the south until it had run over and killed the deceased. That the rules of the defendant required that said whistle be blown before said locomotive be started to backing, and that the bell thereon should be kept ringing during the time it was in motion; that it was the custom of defendant's employes operating switch engines to blow the whistle and keep the bell ringing on locomotives when starting and during its movement; that it was the custom of the defendant's employes propelling its switch engines to blow its said whistle and ring its said bell when coming on or coming off of said "Y;" that it was then and there the duty of the defendant's employes operating said switch engine to blow its said whistle and ring its said bell when moving its said switch engine as aforesaid, independent of any custom or rules, for the proper protection of persons, who might be rightfully in, and using, said railway yards; that there was no person on the back end of

said tender of said engine, being the front as the engine was backing, to keep a lookout for persons who might come in the way of said locomotive; that the rules and custom of the defendant company required some person should always be on the rear of the tender of a switch engine when backing, being the front end as it is backing, for the purpose of keeping a lookout; that the custom of the defendant required that persons should be on the rear of said tender as it backed for the purpose of keeping a lookout; that independent of said rules and customs it was necessary and proper to have some person on the rear of said tender as said locomotive was backing, for the purpose of keeping a lookout for persons or other obstructions that might be in and upon said tracks in said railway yards at said time. That if there had been some person on the rear of said locomotive tender as it backed up on this occasion, he could have seen deceased in time to have prevented his injuries and death; that the engineer and fireman then and there in charge of, operating and propelling said switch engine, failed and refused to keep a lookout for persons on said track; that if they had kept said lookout they could have seen deceased in time to have prevented his being struck and killed, as aforesaid; that said engineer and fireman did then and there see the deceased and his peril, and that the deceased was unaware of his peril, in time to have prevented striking him, but failed and refused to warn deceased, or stop said engine or slow up the same and used no other precaution for his safety, that the engineer, fireman, switchmen and employes of defendant then and there working on and in connection with said locomotive, then and there saw de-

ceased, and saw that he was in peril, and that he was unaware of his peril, in time to have prevented striking him with the use of appliances at their command, but failed and refused to stop said locomotive, or undertake to stop the same; that they saw said deceased, and saw his peril in time to have warned him of his danger and prevented his being struck and killed, but that they then and there failed to warn him, and failed to stop or slow up said locomotive, or use any other precaution for deceased's safety. That at the time deceased was run over and struck as aforesaid, he was traveling along a well defined and marked road, or pathway, that crosses the track he was on that led from said office in the west yards, under and between the trestle and incline, to the coal chutes, to the east yards and the telegraph office thereof; that said pathway and road had been in use by employes, and the public, with the knowledge and acquiescence of said defendant for a long period of time, and that it was well known to defendant that said pathway, or road, was used by its employes, and other persons not engaged in switching trains, who were rightfully in said yards at all times of the day and night, for a long time prior to the time deceased was killed, or it could have been known by the use of ordinary care. Yet defendant's employes then and there in charge of and operating said switch engine failed and refused to give notice of its approach to said road or pathway, by blowing the whistle or ringing the bell, or in any other manner, and then and there failed and refused to keep a lookout for persons that might be using the same; that if said signals had been given, or if the proper lookout had been kept, deceased could

have been warned of the approach of said locomotive, and the same could have been stopped in time to have prevented deceased's injuries and death as aforesaid. That said deceased was a young man, and a raw hand at the work that he was engaged in at said time, having entered his employment for the first time at 7 o'clock on the night he was killed, and did not know the danger incident to the performance of his duties under the circumstances hereinbefore set forth, and was not instructed as to the same by the defendant. That all of said acts of negligence, as hereinbefore set forth, were well known to the defendant prior to the time deceased was killed, or could have been known by the use of ordinary care, in time to have prevented the same, and the consequent death of the deceased; but the same were unknown to deceased. That by reason of all of said acts of negligence, jointly and severally, deceased was struck and cruelly killed as aforesaid.

Plaintiff, Maude Seale, is the surviving wife of deceased; and plaintiffs, F. H. Seale and J. E. Seale, are the father and mother of said deceased, respectively.

That deceased left no children surviving him and plaintiffs herein named have the sole right to sue for damages by reason of the death of deceased.

That at the time deceased was killed he was a young man, 25 years of age, strong, healthy, robust, vigorous, energetic, and bid fair to live to an old age, to-wit, the age of 80 years, but for his untimely death as aforesaid.

At the time and prior to the death of deceased, he was yard and night clerk as aforesaid, and a laborer and

earned large sums of money as such, to-wit, the sum of one hundred (\$100.00) dollars per month; that his time and services were reasonably worth said sum, and would have continued to be worth said sum, and a larger sum, by reason of promotion in said occupation; but by reason of his untimely death, his time and services have been wholly lost to plaintiffs. Decedent contributed all his earnings to plaintiffs, and would have continued to have contributed the same to them during the remainder of his and their lives, except for his untimely death as aforesaid. The plaintiff, Maude Seale, is 24 years of age, and plaintiffs, F. H. and J. E. Seale, are 66 years of age respectively, and all of said plaintiffs have a reasonable prospect of living to the age of 80 years each.

That by reason of the premises, plaintiffs have been damaged in actual damages in the sum of Thirty-Five thousand (\$35,000.00) dollars.

Wherefore, plaintiffs sue, and defendants having already answered herein, they pray that upon final trial they have judgment for their damages and costs of suit; and that said damages be apportioned among them as required by law (Rec. 1-5).

Pleadings of Plaintiff in Error.

In reply to said petition in the District Court of Grayson County, Texas, plaintiff in error alleged:

First. Defendant demurs generally to plaintiff's petition because the facts therein alleged show no cause of action.

Second. Defendant demurs specially to plaintiff's petition because, first, it is too general, vague and indefinite, both (a) in stating the acts of negligence charged against the defendant and (b) the injuries received by plaintiff. Second, because said petition does not show whether or not at the time said Seale was injured he was engaged in the handling of interstate commerce; third, said petition does not show whether or not defendant, at the time it committed the acts complained of, was engaged with respect thereto in the handling of interstate commerce; fourth, said petition does not show whether or not plaintiff's right to recover and defendant's liability and defenses are governed by an Act of Congress passed April 22nd, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases."

Third. Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof thereof.

Fourth. Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by plaintiff's own negligence and want of ordinary care and by that of deceased, M. T. Seale, and his fellow servants. The said injuries, if any were received, resulted from one of the risks assumed by plaintiff and by deceased, M. T. Seale. That of the said defects and causes which produced the injuries complained of, if any were produced, the plaintiff and said deceased M. T. Seale had full notice, or by the exercise of ordinary care on his part, would have had full notice in ample time to have avoided the same.

The deceased was guilty of contributory negligence in that he went upon said track immediately in front of said engine; he went upon said track without exercising any precaution for his own safety; he did not stop, look or listen before entering upon said track; he went upon said track in a run or trot; he was guilty of negligence in going upon said track and in undertaking to cross same at the time when, the place where and the manner in which he did.

Wherefore, defendant prays to be discharged with its costs (Rec. 6-7).

Plaintiff in error's exceptions to defendants in error's petition were overruled and exceptions reserved (Rec. 7).

Facts Proven.

For the purpose of determining the questions involved in this case the evidence shows that plaintiff in error is a railroad, and has yards, tracks, offices and terminals in Sherman, Texas; that M. T. Seale was in its employ, and while engaged in the duties of his employment, about 8:00 P. M. January 16, 1909, was killed by a switch engine of plaintiff in error's while crossing one of its tracks; that the record discloses evidence of negligence on the part of the employes of plaintiff in error in charge of said engine that caused Seale's death; that Maude Seale is the surviving widow and that F. H. Seale and J. E. Seale are the surviving parents of deceased; that they sustained a pecuniary loss by his death, and that the deceased left no children. The record does not disclose whether there was any administration upon the estate of deceased.

**Character of Commerce in Which Deceased and
Plaintiff in Error Were Engaged.**

The following is the evidence as to the character of commerce in which deceased and plaintiff in error were engaged at the time of the accident:

H. S. EMMERTON testified that he was a brakeman in the employ of plaintiff in error coming into Sherman on a train from the north:

"My train on this trip came from Madill, Oklahoma. Well, we started from Sherman and went to Madill and came back. We had brought the train in from across the river. We always get the train across the river. I don't remember whether or not we picked up any car at Denison or not and brought it to Sherman. It was usual on that run for us to pick up freight and bring it to Sherman; that was our business. It depended on what was there as to what amount of freight we picked up at Denison, as a rule. As a rule we picked up one or two cars and the balance of it we would bring over from Oklahoma. I don't remember about how many cars were in our train that night. I should judge there were fifteen cars in the train. At the time the accident occurred I was riding in the door of the caboose on the right hand side. It was a side door. The train was drifting down the lead and on into one of those tracks * * * I was standing in the right hand, or west door, of the cab. I saw a light come out of the freight house door, north door, which was moving rather fast and started across east and under the coal chute. Just came out there in time to make connection with the switch engine as the switch engine came out of one of those tracks. I

saw a light come out of the door in the north end of the shed and go in an east or northeasterly direction towards the track the switch engine was on. That just made a good meeting point there, you might say * * * From the movement of the light I judge that the party was running. It was dark (Rec. 100-101).

The movement of the light drew my attention to it, because it was going faster than ordinarily. I never took my eyes off the man that came out with the light until I saw the light disappear. * * * I went over there to where the man was killed. He was dead when I got there. It was about five minutes after I saw the light disappear before I went over there. The man was lying between the rails when I got there (Rec. 101-2).

D. B. SNYDER testified that he was working in the office of plaintiff in error in its yards at Sherman:

I remember Mr. Seale's coming into the office on the night of the 16th before he was killed. He came in and brought some messages and laid them on the train clerk's desk, and went on out to catch a train; went on out towards the yards to catch a train. He came in pretty fast and went out in a hurry. * * * He was going out to catch the numbers on a train that was coming in from the north. That was his business to take the numbers of the cars in the trains as they came in and went out. * * * Seale was known as yard clerk. * * * I know what he went out for because I saw the train coming in. The train was not in at that time. It was just coming over the hill; just coming down

in the yards when he went out. It was his duty as yard clerk to go out there and get the numbers on that train and bring them back to the office. He left the office fast and came in fast. * * * It was just about half a minute after he went out before I saw him again—maybe less than that. I went to where he was. I found him between the tracks. The track that comes up from the coal chutes * * * I don't know just exactly how far it was north of the north side of the office I was working in. It was about fifty feet. He appeared to be dead to me. * * * I said Mr. Seale was going out to take the numbers of the cars in the train that was coming in. There was not more than one train coming in at that time; just one train coming in from the north (Rec. 102-103).

WILL WINSLETT testified that he was night train clerk for plaintiff in error at Sherman; that he remembered the occurrence of the death of M. T. Seale:

Seale was yard clerk working under me. * *
 * Seale was subject to my control and direction. The duties of Seale at the time was on the arrival of trains to get the initial and number of all the cars on the train, and get the seals on both sides and the end of the cars, both on the in and outbound trains. Seale also had to check over my check book and compare, and if correct place his seal thereon. * * * When I went to work Seale was in the office. He first took his lantern and left office and was out until about 7:40 p. m., when he returned from the telegraph office and handed me a bunch of messages, and I asked him where he had been

and he told me had been at telegraph office. Before I finished looking over the messages a train whistled in from the north and Seale grabbed his yard book and lantern and said: "I will have to catch this train," and left the office in a run. * * * Seale was in the office about five minutes, during which time I was looking over messages, before he said "a man is coming in from the north and I will go out and catch him." He did immediately leave out of door after making remark, but was in office at least five minutes before he said he would go to catch the train. I understood him to mean that a train was coming in and that he was going out to get the initials of the cars and seals and numbers of cars in train, and seals on each door and window of the cars. I heard the train whistle four long whistles, and immediately after the whistle Seale made the remark, or something like that stated. * * * He did mean that a train was coming in and that he would go out and get the numbers of the cars therein. I never saw Seale alive after the occurrence. * * * Brewer, foreman of the north lead switch engine, came into my office and asked me who ran out of door with lantern. * * * I told him it was the new yard clerk. He said, "come out and get him." I asked him if he was hurt, and Brewer said he thought the man was dead. Seale left going out of the door north. It was the duty of the deceased, M. T. Seale, to go from said office to those incoming trains and take the number of cars therein and report back to the office (Rec. 105-108).

A. T. GRIBBLE testified that he ^{was} chief clerk for plaintiff in error at its north yard in Sherman at the time Seale was killed:

I would have a pretty good idea of the amount of freight handled there at the north yard. We get up statements each month showing. I have charge of that, or have connection with it. I figure all the tonnage statements showing the amount of each class of freight, commodity and destination. I suppose 98 per cent of the business we handle there in those yards is interstate business. All northbound trains from Sherman go over Red River into Oklahoma; trains from the north into Sherman come from Oklahoma. There is very little business originating at Denison; southbound business. There is one small siding between Denison and Red River. We do not receive freight there. I don't suppose there would be four cars of stuff a month coming from Denison into our yards. The number of cars of merchandise that comes in from the north depends on the season of the year. When business is good we handle possibly 200 loads a day from the north and higher than that. Just at this time business is not heavy and we handle about 80 to 100 loads, I suppose. * * * Our north bound business is not so heavy as our southbound business. When the train comes the conductor will turn in a switch list that will be copied into what we call the train book. We have four train books—inbound on north and inbound on south and outbound in both directions, and the yard clerk gets the seals and we check up the train. Mr. Winslett copied the numbers into the train book at the time of this ac-

cident. He would copy that from the conductor's switch list. That is done on all trains. It is part of the regular and permanent records of my office that is done in the regular course of the business out there. From my experience with those records they are correctly kept. The yard clerk catches the numbers as the train comes in and then he checks his numbers against the conductor's numbers to see if there is any error, and if he has a number that the conductor hasn't got, if there is any difference in the number they go to the waybill and straighten it out in order to get the correct car number for the car accountant (Rec. 111).

In this connection the report of Conductor German's train on that night, it being the train that Seale was going out to take the numbers of, was introduced and showed. Among other things ten cars of freight billed from points in Oklahoma to points in Texas (in Record between pages 110 and 111).

Charge of District Court.

In substance the District Court submitted to the jury as issues of negligence the manner in which the switch engine was being operated at the time Seale was killed, Seale's contributory negligence and the issues of the employees in charge of the switch engine having discovered Seale in peril in time to have prevented his injury, and instructed the jury that if they found those issues in favor of plaintiffs to allow to each of the plaintiffs such pecuniary loss as they sustained by reason of the death of Seale (Rec. 7-11).

Instructions Requested by Plaintiff in Error.

Before the jury retired plaintiff in error, among others, requested the court to give the following instructions, which were refused:

13. The plaintiffs in this case are not shown to be the legal representatives of the deceased, Memory T. Seale, and are not entitled to prosecute this suit nor to recover in any sum, and you will, therefore, return your verdict in favor of defendant (Rec. 17).

14. In no event are the plaintiffs, F. H. Seale and J. E. Seale, entitled to recover any sum in this case (Rec. 18).

16. At the request of the defendant you are instructed that the undisputed evidence in this case shows that the deceased at the time of his death, and in performing the duties, in the performance of which he was engaged at the time of his death, and out of the performance of which arose the relation and respective duties between him and defendant, on account of which defendant is liable herein to plaintiffs, if liable at all, was engaged in interstate commerce, and plaintiffs' rights of action, if any, are governed by the acts of Congress applicable to interstate commerce, and you will, therefore, return your verdict in this case for defendant (Rec. 19).

17. If you believe from the evidence at the time that M. T. Seale was killed that he was proceeding from the office of defendant in its yards at Sherman to a train for the purpose of taking the numbers of the cars in said train, and that said

train had just arrived in said yards from the north, and that the said train was a freight train, and that the freight in said train had been transported from another state into the State of Texas, and was being delivered into the yards of defendant, then you are instructed that at the time of his death that plaintiff was in the service of defendant engaged in interstate commerce, and if you so believe, then you are instructed that plaintiffs are not entitled to recover in this case, and you will, therefore, return your verdict in favor of defendant (Rec. 19-20).

Judgment.

The trial of the case resulted in a verdict and judgment which was rendered May 12, 1910, in favor of defendants in error, and against plaintiff in error, as follows:

In favor of Maude Seale \$9,000.00, F. H. Seale \$1,000.00 and J. E. Seale \$1,000.00 (Rec. 20).

Motion for New Trial.

In due time plaintiff in error presented its motion in the District Court of Grayson County, and asked that court to grant it a new trial in said cause, among others, for the following reasons:

I.

The court erred in overruling defendant's second special exception to plaintiff's petition, as follows:

Because said petition does not show whether or not at the time said Seale was injured he was engaged in the handling of interstate commerce (Rec. 21).

II.

The court erred in overruling defendant's third special exception to plaintiff's petition, 'as follows:

Said petition does not show whether or not defendant, at the time it committed the acts complained of, was engaged with respect thereto in the handling of interstate commerce (Rec. 21).

XVI.

The judgment of the court in favor of the plaintiff, Maude Seale, is contrary to law, and to the evidence in this case in that the undisputed evidence shows that the deceased, for whose death the suit is brought, was, at the time of his death, engaged in interstate commerce and the right, if any, of said plaintiff, Maude Seale, to recover in this case is given and governed by the Act of Congress relating to Interstate Commerce and to the Liability of Common Carriers to their Employes, and no right of action is given for death to the wife of an employe killed while engaged in such commerce, but is given only to the personal representative of such deceased employee (Rec. 25).

XVII.

The judgment of this court is contrary to law and to the evidence in this case insofar as the same is in favor of the plaintiff, F. H. Seale, in that the undisputed evidence shows that the deceased, Mem-

ory T. Seale, on account of whose death this suit is brought, was at the time of his death engaged in interstate commerce, and the right, if any, of said plaintiff, F. H. Seale, to recover on account of said death is governed by the Act of Congress relating to liability of common carriers to its employees in certain cases, and no right of action is given by said Act to the parents of the deceased in cases where the deceased left surviving him a wife (Rec. 26).

XVIII.

The judgment of the court is contrary to law and to the evidence in this case insofar as the same is in favor of the plaintiff, J. E. Seale, in that: 1. The undisputed evidence shows that at the time of the death of said Memory T. Seale, on account of whose death this action is brought, he was engaged in interstate commerce, and the right of said plaintiff to recover on account of his said death is governed by the Act of Congress relating to the liability of common carriers to *its* employees in certain cases, and by the provisions of said Act and of the law applicable to this case no right of action is given to the parent of the deceased in cases where said deceased left surviving him a wife, as said deceased in this case did. (2) The undisputed evidence shows that at the time of the death of said Memory T. Seale, and at the time of this trial, said J. E. Seale was and now is a married woman, whose husband is a party to this suit (Rec. 26).

XXXI.

The court erred in refusing to give to the jury special charge No. 13 requested by defendant (Rec. 27).

XXXII.

The court erred in refusing to give to the jury special charge No. 14 requested by defendant (Rec. 27).

XXXIII.

The court in refusing to give to the jury special charge No. 16 requested by defendant (Rec. 27).

XXXIV.

The court erred in refusing to give to the jury special charge No. 17 requested by defendant (Rec. 27).

Which motion was by the district court overruled and exceptions were reserved (Rec. 28).

After the motion for new trial was overruled the cause was appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, and errors assigned on appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. The following errors, among others, were assigned on appeal, and are all that are deemed of importance in the determination of the questions herein presented.

I.

The court erred in overruling defendant's second special exception to plaintiff's petition, as follows:

Because the said petition does not show whether or not at the time said Seale was injured he was engaged in the handling of interstate commerce (Rec. 40).

II.

The court erred in overruling defendant's third special exception to plaintiff's petition, as follows:

Said petition does not show whether or not defendant at the time it committed the acts complained of was engaged with respect thereto in the handling of interstate commerce (Rec. 40).

XVI.

The judgment of the court in favor of plaintiff, Maude Seale, is contrary to law, and to the evidence in this case, in that the undisputed evidence shows that the deceased, for whose death the suit is brought, was, at the time of his death, engaged in interstate commerce and the right of said plaintiff, Maude Seale, to recover is given by the Act of Congress Relating to Interstate Commerce and to the Liability of Common Carriers to their Employes, and no right of action is given for the death to the wife of an employe killed while engaged in such commerce, but is given only to the personal representatives of such deceased employe (Rec. 44).

XVII.

The judgment of this court is contrary to law and to the evidence in this case in so far as the same is in favor of the plaintiff, F. H. Seale, in that the undisputed evidence shows that the deceased, Memory T. Seale, on account of whose death this suit is brought, was at the time of his death engaged in interstate commerce, and the right of said plaintiff, F. H. Seale, to recover on account of said death is governed by the Act of Con

gress relating to Liability of Common Carriers to *its* employes in certain cases, and no right of action is given by said act to the parents of the deceased in case where the deceased left surviving him a wife (Rec. 45).

XVIII.

The judgment of the court is contrary to law and to the evidence in this case in so far as the same is in favor of plaintiff, J. E. Seale, in that (1) the undisputed evidence shows that at the time of the death of said Memory T. Seale, on account of whose death this action is brought, he was engaged in interstate commerce, and the right of said plaintiff to recover on account of said death is governed by the Act of Congress relating to the Liability of Common Carriers to *its* Employes in Certain Cases, and by the provisions of said act and of the law applicable to this case no right of action is given to the parent of the deceased in cases where said deceased left surviving him a wife, as said deceased in this case did; (2) the undisputed evidence shows that at the time of the death of said Memory T. Seale, and at the time of this trial, said J. E. Seale was and is a married woman, whose husband is a party to this suit (Rec. 45).

XXXI.

The court erred in refusing to give to the jury special charge No. 13, requested by defendant (Rec. 46).

XXXII.

The court erred in refusing to give to the jury special charge No. 14, requested by the defendant (Rec. 46).

XXXIII.

The court erred in refusing to give to the jury special charge No. 16, requested by defendant (Rec. 46).

XXXIV.

The court erred in refusing to give to the jury special charge No. 17, requested by defendant (Rec. 46).

Opinion of Court of Civil Appeal.

Said cause was by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas on June 15, 1912, disposed of and the judgment of the District Court was affirmed. The opinion is as follows:

Appellees sued the appellant to recover damages for the negligent killing of Memory T. Seale, who was the son of F. H. and J. E. Seale, and the husband of Maude Seale.

A trial was had and a verdict and judgment were rendered for plaintiffs and defendant appeals.

Appellant complains of the action of the court in overruling its second and third special exceptions to plaintiffs' petition, on the ground that said petition did not show that at the time of the accident whether or not defendant was engaged in interstate commerce and whether or not deceased was engaged in handling said commerce.

The proposition submitted by appellant under said assignment is: "If defendant was engaging in the transportation of interstate commerce, and deceased was in its employ in connection therewith at the time he was injured, the cause of action and de-

fendant's liability would be governed by and founded upon Act of Congress passed April 22, 1908, entitled 'An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases,' while if defendant was not so engaged the rights of the parties would be governed by and founded upon the death and assumption of risk statutes and other laws of the State of Texas. These laws being different the defendant, by special exception, had the right to require plaintiffs to allege in their petition such facts as would enable it to determine which of these laws applied."

We do not think the court erred in overruling the exceptions as stated.

The action was brought under the state law and the petition stated a good cause of action was not subject to the exceptions presented. This precise question was passed upon by this court in the case of *Railway Co. v. Neaves*, 127 S. W. 1090, and a writ of error was denied by our Supreme Court, the holding in said case being contrary to appellant's contention.

The evidence shows that at the time Memory T. Seale was killed he was in the employ of appellant in the capacity of yard clerk in the yards at North Sherman, Grayson County, Texas. While in the discharge of his duties as such clerk he was struck and killed by appellant's servants in the negligent operation of an engine.

The court did not err in charging the jury that deceased had just gone to work as yard clerk for appellant. The evidence shows he was killed at night when he had been at work for the first time in that capacity about forty minutes.

We think the evidence such that the issue of discovered peril was raised and the court did not err in charging on that issue. The trial court refused a special charge requested by appellant, of which it complains, said charge reading: "The plaintiffs in this case are not shown to be the legal representatives of the deceased, M. T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant."

The proposition submitted thereunder is: "The deceased, at the time of receiving the injuries which caused his death, was engaged in interstate commerce, and the cause of action, if any, arising on account of his death is based upon, and controlled by, the act of Congress approved April 22, 1908, entitled 'An Act Relating to the Liability of Common Carriers by Railroads to their Employes in Certain Cases,' commonly called the 'Federal Employers' Liability Act,' and not the Texas death statute, which was superseded by the said act of Congress as to causes of action coming within its terms, and since the plaintiffs have not brought themselves within the provisions of said act there can be no recovery on their part in this suit."

We are of the opinion that the court did not err in refusing said charge. There was no plea in abatement for the want of capacity in plaintiffs to maintain this suit, which was necessary under our statutes to take advantage of such defects, if any, and which plea should be filed in due order of pleading. Rev. Stats., 1268-1269; *Blum v. Strong*, 71 Tex. 328.

The statutes of Texas authorize a recovery by plaintiffs as set forth in their petition, and there was no pleading by defendant setting forth as a defense to said cause the Act of Congress, approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroads to Their Employes in Certain Cases," commonly called the "Federal Employers' Liability Act," which Act, whatever effect it may have upon the statutes, cannot be invoked to defeat plaintiffs' right of recovery in this suit, as it was in no way pleaded by defendant. The plaintiffs are the real beneficiaries. The fact that the suit was not brought in the name of some administrator or executor of the estate of Memory T. Seale, deceased, should not prevent a recovery.

All assignments not mentioned herein have been considered, but none present reversible error.

The evidence supports the verdict and the judgment is affirmed (Rec. 118-119).

And judgment was entered in accordance with said opinion (Record 120).

Thereafter plaintiff in error presented in said Court of Civil Appeals its motion for rehearing again presenting said assignments (Rec. 120-126), and in an argument insisted that plaintiff in error and deceased were engaged in interstate commerce at the time of the accident; that said cause was governed by the Federal Employers' Liability Act, and was not governed by any other law, and that said act did not give a cause of action to any of the plaintiffs in said cause (Rec. 126-128), which

motion was by said Court of Civil Appeals on June 22, 1912, in all things overruled, and the following opinion rendered:

Opinion on Motion for Rehearing.

Appellant insists that the facts of this case *bring it* within the Act of Congress approved April 22nd, 1908, known as the "Federal Employers' Liability Act," and the same is controlled by its provisions. As said by Mr. Chief Justice Brown, in the case of *M. K. & T. Ry. Co. v. Blalack*, recently decided, "this court has never questioned that the Constitution of the United States and the laws enacted by Congress in the exercise of powers derived from the constitution are superior to the laws of this on the same subjects." We are of the opinion, however, that the facts in this case do not bring it within the purview of the Federal Statute. The deceased was run over and killed by a switch engine operated in the yards of appellant in Sherman, Texas. He was working under T. A. Gribble, who was chief clerk out at those yards and in charge of the same. Deceased's work was done in connection with the clerks in the yards, and with the switch crew. After a train was brought in, it was delivered to the switch crew. The first act was to obtain the numbers of the cars and make a record of them in the office, then the switch crew begun the work of tearing the train up and making new trains. He got the numbers and initials of each car that came in and went out of the yards. When a train comes in the yards he goes out and gets the number and initials of each car and gets the seals that are on the car doors. Whatever impression is on the seal he

keeps in his book that he carries. He gets the number of the train. He gets the cars that are made out for this train according to the conductor's switch list. He puts the cards on the cars in order that the switchmen may switch the train properly. After he does that he goes in the office and checks his list, checks his book in the office with the train clerk and also enters his seals. It is done in order to keep records. A train was coming in from Oklahoma at that time. It was a freight train. The north Sherman yards were the terminal for that train. That is, that was the end of the run of that train. If any trains went south they were made up in the yards, new trains and sent south, or other trains made up and sent north. The evidence does not show that any of the cars in the train coming in were destined for other points. Such being the evidence this case is not controlled by said Federal Act.

The motion for rehearing is overruled (Rec. 129-130).

Thereafter plaintiff in error presented to the Supreme Court of Texas its application for writ of error, and asked that court to take jurisdiction and review said cause, which application, on October 16, 1912, was by said court refused (Rec. 130).

Plaintiff in error thereafter, on October 25, 1912, presented its petition for a writ of error for the removal of said cause to this court directed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas to Honorable J. R. Lamar, Associate Justice and the same was allowed; supersedeas bond approved and filed,

writ of error issued and filed in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas on November 5, 1912 (Rec. 131-132 and 134-137).

It is proper to state that the file mark of the clerk of the Court of Civil Appeals does not appear on the writ of error (Rec. 135) but the same does appear on the petition to this court for writ of error (Rec. 132), and on the supersedeas bond to this court (Rec. 137). Service of citation was had Nov. 4, 1912 (Rec. 136).

Errors Assigned on Petition for Writ of Error From the Supreme Court of the United States.

Now comes the St. Louis, San Francisco & Texas Railway Company, plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas erred to the grievous injury and wrong of the plaintiff in error, and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

I.

The Court of Civil Appeals erred in holding that Memory T. Seale at the time of the injury, which caused his death, was not employed in interstate commerce, and that the cause of action for damages on account of his death was not governed by the Federal Employers' Liability Acts.

II.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The court erred in refusing to give to the jury special charge No. 13, requested by defendant:

The plaintiffs in this case are not shown to be the legal representatives of the deceased, Memory T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant.

III.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The judgment of the court in favor of plaintiff, Maude Seale, is contrary to law, and to the evidence in this case, in that the undisputed evidence shows that the deceased for whose death this suit is brought, was, at the time of his death, engaged in interstate commerce, and the right of said plaintiff, Maude Seale, to recover is given by the Act of Congress relating to interstate commerce and to the liability of common carriers to their employes, and no right of action is given for the death to the wife of an employe killed while engaged in such commerce, but is given only to the personal representative of such deceased employe.

IV.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The court erred in refusing to give to the jury special charge No. 14 requested by defendant, as follows:

In no event are the plaintiffs, F. H. Seale and J. E. Seale entitled to recover any sum in this case.

V.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The judgment of this court is contrary to law and to the evidence in this case in so far as the same is in favor of the plaintiff, F. H. Seale, in that the undisputed evidence shows that the deceased, Memory T. Seale, on account of whose death this suit is brought, was at the time of his death engaged in interstate commerce, and the right of said plaintiff, F. H. Seale, to recover on account of said death is governed by the Act of Congress relating to Liability of common carriers to its employes in certain cases, and no right of action is given by said act to the parents of the deceased in case where deceased left surviving him a wife.

VII.

The Court of Civil Appeals erred in not reversing and rendering the judgment rendered in this case by the trial court.

Wherefore, for this and other manifest errors appearing in the record, the said St. Louis, San Francisco & Texas Railway Company, plaintiff in error, prays that the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error, granting it its rights under the statutes and laws of the United States, and plaintiff in error also prays judgment for its costs (Rec. 132-4).

Statutes Involved.

Employers' Liability Act of 1908.

So far as pertinent to the questions involved Section I of the Federal Employers' Liability Act is as follows:

That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between the District of Columbia and any of the states or territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect of insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Texas Death Statute.

Insofar as pertinent to the questions here presented the Texas Death Statute is as follows:

Art. 4694. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: (1) When the death of any person is caused by the negligence or carelessness of the proprietor, owner,

charterer, or hirer of any railroad, steamboat, stage coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents * * *.

Art. 4698. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

Art. 4699. The action may be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all.

Jurisdiction of Texas Courts.

Court of Civil Appeals.

Insofar as pertinent, the provisions of the Texas statutes as to the jurisdiction of courts, is as follows:

Art. 1589. The appellate jurisdiction of the Courts of Civil Appeals shall extend to civil cases within the limits of their respective districts:

1. Of which the district courts have original or appellate jurisdiction * * *.

Art. 1591. The judgments of the Courts of Civil Appeals shall be conclusive on the law and fact, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to-wit: * * *

(Here are enumerated a number of cases which do not embrace a case like the one here presented.)

Supreme Court.

Art. 1521. The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the state, which shall extend to questions of law arising in all civil cases of which the Courts of Civil Appeals have appellate but not final jurisdiction.

Art 1522. All causes shall be carried up to the Supreme Court by writs of error upon final judgment and not on judgments reversing and remanding causes, except in the following cases: *

* *

(Which cases do not embrace the case here presented.)

Art. 1523. The Supreme Court shall, from time to time, make and promulgate suitable forms, rules and regulations for carrying into effect the articles of this title relating to the jurisdiction and practice of the Supreme Court.

Art. 1540. Any party desiring to sue out writ of error before the Supreme Court shall present his petition addressed to said court, stating the nature of his case and the grounds upon which the writ of error is prayed for, and showing that the Supreme Court has jurisdiction thereof; and the petition shall contain such other requisites as may be prescribed by the Supreme Court.

Art. 1541. The petition shall be filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing, and thereupon the said clerk of the Court of Civil Appeals shall note upon his record the filing of said application.

Art. 1542. The clerk of the Court of Civil Appeals shall forward to the clerk of the Supreme Court the said petition, together with the original record in the case, and the opinions of the Court of Civil Appeals, and the motion filed therein, and certified copies of the judgments and orders of the Court of Civil Appeals. * * *

Art. 1544. If, upon examination of a petition for writ of error the Supreme Court shall find that there is error in the judgment of the Court of Civil Appeals, it shall grant a writ of error, returnable within the time and in the manner prescribed by the rules of that court.

The above and foregoing are believed to be all the statutes pertinent to the questions raised in the motion to dismiss in this case.

Rules for Texas Supreme Court.

Under the authority given it the Supreme Court has promulgated the following rules with reference to applications for writs of error:

1. Applications for writs of error shall be addressed to the court and shall embrace specific assignments of error confined to the points of law presented in the motion for rehearing in the Court of Civil Appeals, and also presented in the motion for a new trial in the trial court. The petition for writ of error shall be as brief as practicable and need only contain the requisites prescribed by the statute and the rules of this court. The statement of the case by the Court of Civil Appeals, their conclusions of fact and law and their opinion will be read in con-

nection with the application, and if it appear therefrom that the case belongs to the class in which, as a general rule, the jurisdiction of the Court of Civil Appeals is not made final by the statute and that this judgment has been affirmed, this court will take jurisdiction thereof. * * *

Each ground of error must be presented separately by an assignment stating succinctly and clearly the ground of error relied on. If it be claimed that the court committed a like error of law in more than one instance, all such errors may be presented under one assignment by separate propositions. If the assignment of error be not a proposition of law within itself, then it shall be followed by such propositions as may be necessary to present the question for decision by this court.

Each assignment of error may be followed by a statement of the facts upon which the applicant relies to show that the decision of the court is erroneous. If the facts cited in the statement be not embraced in the opinion of the court, then the applicant shall refer to the page and line of the statement of facts upon which he relies, giving the page and line on which the statement begins and that on which it ends, omitting all facts not relevant to the proposition.

The applicant may embrace in his petition an argument upon each assignment, which shall follow the statement of facts, and must be as brief as is consistent with due presentation of the question.

The plaintiff in error shall file the application with the clerk of the Court of Civil Appeals in which the proceeding sought to be reviewed was had in the

manner and time required by law, and shall, in addition to such requirement, deposit with the clerk of said court a true copy of the application to be delivered by said clerk to the defendant in error, which copy shall not be marked filed. The plaintiff in error or the attorney, shall notify the attorney of the defendant in error of the filing of the application and the deposit of the copy thereof.

2. The clerk of this court shall receive all applications for writs of error, and file the petition and accompanying transcript from the Court of Civil Appeals, and enter the case upon the docket kept for that purpose. * * * The cases shall be numbered consecutively on the application docket and the number shall be placed upon the application.

3. After the expiration of ten days from the filing of the record and the application in this court it will be deemed submitted to the court and ready for disposition and will be acted upon by the court, unless for sufficient reason the court may grant further time to either party.

4. When the plaintiff in error has failed to file his application within the time prescribed by law, the clerk of this court shall submit the matter to the court before filing same, with any statement of excuse which may be presented by the applicant, and the court will act upon such application to file. If it be refused, then no record will be made of the application or the disposition of it.

When the application shall have been filed for a period of ten days, if the court shall determine to refuse the same, then, whether the defendant has answered or not, the clerk of the court shall retain the application, together with the transcript and ac-

companying papers, for fifteen days from the day of the rendition of the judgment refusing the writ. At the end of that time, if no motion for rehearing has been filed, or upon the overruling or dismissal of such motion, in case one has been filed, the clerk of this court shall transmit to the Court of Civil Appeals to which the writ of error is sought a certified copy of the orders of this court denying such application and of the order overruling the motion for a rehearing thereof, and shall return the papers which belong to that court to the clerk thereof, but shall retain the petition for writ of error. A motion for rehearing of an application for writ of error is not a matter of right, but in case such motion shall be filed within fifteen days after the refusal of the application and before the court shall adjourn for the term, the court will consider the same if it be based upon a ground not embraced in the application or contains the citation of authorities not before cited. The presentation of any point or points presented in the application without urging some new argument or citing some new authority will be deemed a sufficient ground for dismissing the motion.

The foregoing rules were promulgated by the Supreme Court in January, 1912, and do not appear as yet in any of the official reports of the Texas Supreme Court, but may be found in the front of Vol. 142 S. W. Rep., at pages VII and VIII.

Motion of Defendants in Error to Dismiss or Affirm.

Now comes defendants in error and move the court to dismiss this cause for the want of jurisdiction, because the record discloses:

1. There is no petition for writ of error from the Texas Supreme Court to the Texas Court of Civil Appeals, hence it does not appear that the plaintiff in error undertook to have the case reviewed by the highest state court. If, in fact, a petition for writ of error from the Texas Supreme Court to the Texas Court of Civil Appeals was actually filed, its absence from the record fails to disclose to the court whether or not the matters on which plaintiff in error relies to give this court jurisdiction were passed on by the Texas Supreme Court, the highest appellate court of said state.

2. At the time of the granting of the writ of error by justice of this court, there was no final judgment in this cause in the state court such as would authorize the removal of the cause from the state court to this court under Section 709 of the United States Revised Statutes.

3. In the trial of the cause in the state court, no issue was determined involving the construction of what is known as the Federal Employers' Liability Act; therefore its validity was not determined by the state court, nor was it construed by said court. It is by reason of said act that plaintiff in error claims jurisdiction in this court.

4. The construction of the Federal Employers' Liability Act was not plead nor raised in the state court in the manner required by the practice of the Texas Courts, and the decisions of its appellate courts thereon.

5. Said cause was decided upon other issues independent of the construction of the Federal Employers' Liability Act, which issues were sufficient upon which to base the judgment of the state court.

In the event the court holds that it has jurisdiction of this cause and overrules this motion to dismiss the same, then defendants in error move the court to affirm said cause because :

1. It is manifest that the writ of error was taken for delay only, as the question upon which jurisdiction depends is so frivolous as not to need further argument.

2. That the question upon which the jurisdiction of this court depends was so manifestly decided right, that the case ought not to be held for further argument.

BRIEF OF ARGUMENT ON MOTION TO DISMISS.

Brief Statement of Case and Issues.

Defendants in error instituted their suit to recover damages on account of injuries received by M. T. Seale that resulted in his death. They allege that his death was due to the negligence of the employes of the plaintiff in error, and that he was, at the time of his death, in the performance of his duties as an employe of that railroad. The petition, though voluminous, does not either directly or inferentially allege whether at the time of the injury and death of Seale, he and the railroad for which he was working, were engaged in interstate or intrastate commerce.

In a case of this character no action can be maintained at common law, and if defendants in error have a cause of action it rests on a statute. Two statutes exist—one covering the field of federal jurisdiction and the other state jurisdiction; one covering employes of railroads engaged in interstate commerce, the other those engaged in intrastate commerce, each all powerful and supreme in their respective spheres, but neither of any force beyond such sphere. Of both of these statutes the Texas courts take judicial notice, and it was unnecessary for defendants in error to plead them, or to refer to them in order to enforce rights under them, but it was the view of plaintiff in error that they should have plead

facts that would enable the court and plaintiff in error to know on which they relied.

Plaintiff in error presented exceptions to the petition on the ground that facts were not plead from which it could be determined on what law defendants in error relied, but its exceptions were denied.

On the trial the evidence showed that at the time of his death Seale and the railroad for which he was working were engaged in interstate commerce. When the evidence disclosed that the deceased was an employe of a railroad engaged in interstate commerce at the time of his death, plaintiff in error contended that the cause of action was alone governed by the federal statutes; that no cause of action was given by that statute to the defendants in error; that they were not the *legal representatives* of the deceased; were not entitled to maintain the suit, and that the facts disclosing that the deceased left a surviving widow, under no circumstances were the parents of deceased entitled to recover any sum in this case. These propositions were raised then by the following requested instructions presented to the trial court, which were refused:

13. The plaintiffs in this case are not shown to be the legal representatives of the deceased M. T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant (Rec. 17).

14. In no event are the plaintiffs, F. H. Seale and J. E. Seale, entitled to recover any sum in this case (Rec. 18).

16. At the request of the defendant you are instructed that the undisputed evidence in this case shows that the deceased, at the time of his death, and in performing the duties, in the performance of which he was engaged at the time of his death, and out of the performance of which arose the relation and respective duties between him and defendant, on account of which defendant is liable herein to plaintiffs, if liable at all, was engaged in interstate commerce, and plaintiffs' rights of action, if any, are governed by the acts of Congress applicable to interstate commerce, and you will therefore return your verdict in this case for defendant (Rec. 19).

17. If you believe from the evidence at the time that M. T. Seale was killed that he was proceeding from the office of the defendant in its yards at Sherman to a train for the purpose of taking the numbers of the cars in said train, and that said train had just arrived in said yards from the north and that the said train was a freight train, and that the freight in said train had been transported from another state into the State of Texas, and was being delivered into the yards of defendant, then you are instructed that at the time of his death that plaintiff was in the service of defendant engaged in interstate commerce, and if you so believe, then you are instructed that plaintiffs are not entitled to recover in this case, and you will therefore return your verdict in favor of defendant (Rec. 19-20).

When in the trial court judgment was rendered in behalf of defendants in error plaintiff in error presented

its motion for a new trial and insisted that that court had erred in refusing its requested instructions, and that said judgment was erroneous for the following reasons:

XVI.

The judgment of the court in favor of the plaintiff, Maude Seale, is contrary to law, and to the evidence in this case in that the undisputed evidence shows that the deceased, for whose death the suit is brought, was, at the time of his death, engaged in interstate commerce and the right, if any, of said plaintiff, Maude Seale, to recover in this case is given and governed by the Act of Congress relating to Interstate Commerce and to the liability of common carriers to their employes, and no right of action is given for death to the wife of an employe killed while engaged in such commerce, but is given only to the personal representative of such deceased employe (Rec. 25).

XVII.

The judgment of the court is contrary to law and to the evidence in this case in so far as the same is in favor of the plaintiff, F. H. Seale, in that the undisputed evidence shows that the deceased, Memory T. Seale, on account of whose death this suit is brought, was at the time of his death engaged in interstate commerce, and the right, if any, of said plaintiff, F. H. Seale, to recover on account of said death is governed by the Act of Congress relating to liability of common carriers to *its* employes in certain cases, and no right of action is given by said Act to the parents of the deceased in cases where the deceased left surviving him a wife (Rec. 26).

XVIII.

The judgment of the court is contrary to law and to the evidence in this case in so far as the same is in favor of the plaintiff, J. E. Seale, in that (1) the undisputed evidence shows that at the time of the death of said Memory T. Seale, on account of whose death this action is brought, he was engaged in interstate commerce, and the right of said plaintiff to recover on account of his said death is governed by the Act of Congress relating to the liability of common carriers to *its* employes in certain cases, and by the provisions of said Act and of the law applicable to this case no right of action is given to the parent of the deceased in this case where deceased left surviving him a wife, as said deceased in this case did; (2) The undisputed evidence shows that at the time of the death of said Memory T. Seale, and at the time of this trial, said J. E. Seale was and now is a married woman, whose husband is a party to this suit (Rec. 26).

When the case was carried to the Court of Civil Appeals on appeal the refusal of each of these requested charges, and the failure of the trial court to grant a new trial on the ground that the judgment was contrary to the law and evidence, as set forth in the foregoing grounds, were each assigned as error, and the propositions raised thereby were by that court decided in its opinion, as follows:

Appellant complains of the action of the court in overruling its second and third special exceptions to plaintiffs' petition, on the ground that said petition did not show that at the time of the acci-

dent whether or not defendant was engaged in interstate commerce and whether or not deceased was engaged in handling said commerce.

The proposition submitted by appellant under said assignment is: "If defendant was engaging in the transportation of interstate commerce, and deceased was in its employ in connection therewith at the time he was injured, the cause of action and defendant's liability would be governed by and founded upon Act of Congress passed April 22, 1908, entitled 'An Act Relating to the Liability of Common Carriers by Railroads to Their Employes in Certain Cases,' while if defendant was not so engaged the rights of the parties would be governed by and founded upon the death and assumption of risk statutes and other laws of the State of Texas. These laws being different the defendant, by special exception, had the right to require plaintiffs to allege in their petition such facts as would enable it to determine which of these laws applied."

We do not think the court erred in overruling the exceptions as stated.

The action was brought under the state law and the petition stated a good cause of action, and was not subject to the exceptions presented. This precise question was passed upon by this court in the case of *Railway v. Neaves*, 127 S. W., 1090, and a writ of error was denied by our Supreme Court, the holding in said case being contrary to appellant's contention.

The evidence shows that at the time Memory T. Seale was killed he was in the employ of appellant in the capacity of yard clerk in the yards in North

Sherman, Grayson County, Texas. While in the discharge of his duties as such clerk he was struck and killed by appellant's servants in the negligent operation of an engine * * *

The trial court refused a special charge requested by appellant, of which it complains, said charge reading: "The plaintiffs in this case are not shown to be the legal representatives of the deceased, M. T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant."

The proposition submitted thereunder is: "The deceased at the time of receiving the injuries which caused his death, was engaged in interstate commerce, and the cause of action, if any, arising on account of his death is based upon, and controlled by, the Act of Congress approved April 22, 1908, entitled 'An Act Relating to the Liability of Common Carriers by Railroads to Their Employees in Certain Cases,' commonly called the 'Federal Employers' Liability Act,' and not the Texas death statute, which was superseded by the said Act of Congress as to causes of action coming within its terms, and since the plaintiffs have not brought themselves within the provisions of said Act there can be no recovery on their part in this suit."

We are of the opinion that the court did not err in refusing said charge. There was no plea in abatement for the want of capacity in plaintiffs to maintain this suit, which was necessary under our statutes to take advantage of such defects, if any, and which should be filed in due order of pleading. Rev. Stats., 1268-1269; *Blum v. Strong*, 71 Tex. 328.

The statutes of Texas authorize a recovery by plaintiffs as set forth in their petition, and there was no pleading by defendant setting forth as a defense to said cause the Act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroads to Their Employes in Certain Cases," commonly called the "Federal Employers' Liability Act," which act, whatever effect it may have upon the statutes, cannot be invoked to defeat plaintiffs' right of recovery in this suit, as it was in no way pleaded by defendant. The plaintiffs are the real beneficiaries. The fact that the suit was not brought in the name of some administrator or executor of the estate of Memory T. Seale, deceased, should not prevent a recovery.

All assignments not mentioned herein have been considered, but none present reversible error.

The evidence supports the verdict and the judgment is affirmed (Rec. 118-19).

When this case was affirmed by the Court of Civil Appeals the propositions urged in the trial court were again urged upon the Court of Civil Appeals in a motion for rehearing, but that motion was overruled and the following opinion announced:

Appellant insists that the facts of this case bring *it* within the Act of Congress approved April 22nd, 1908, known as the "Federal Employers' Liability Act," and the same is controlled by its provisions. As said by Mr. Chief Justice Brown, in the case of *M. K. & T. Ry. Co. v. Blalack*, recently decided, "this court has never questioned that the Con-

stitution of the United States and the laws enacted by Congress in the exercise of powers derived from that Constitution are superior to the laws of this on the same subjects." We are of the opinion, however, that the facts in this case do not bring it within the purview of the Federal Statute. The deceased was run over and killed by a switch engine operated in the yards of appellant in Sherman, Texas. He was working under T. A. Gribble, who was chief clerk out at those yards, and in charge of the same. Deceased's work was done in connection with the clerks in the yards, and with the switch crew. After a train was brought in, it was delivered to the switch crew. The first act was to obtain the numbers of the cars and make a record of them in the office, then the switch crew begun the work of tearing the train up and making new trains. He got the numbers and initials of each car that came in and went out of the yards. When a train comes in the yard he goes out and gets the number and initials of each car and gets the seals that are on the car doors. Whatever impression is on the seal he keeps in his book that he carries. He gets the number of the train. He gets the cars that are made out for this train according to the conductor's switch list. He puts the cards on the cars in order that the switchman may switch the train properly. After he does that he goes in the office and checks his list, checks his book in the office with the train clerk and also enters his seals. It is done in order to keep records. A train was coming in from Oklahoma at that time. It was a freight train. The north Sherman yards were the terminal for that train. That is, that was the end of the run of that train. If any trains went

south they were made up in the yards, new trains, and sent south, or other trains made up and sent north. The evidence does not show that any of the cars in the train coming in were destined for other points. Such being the evidence this case is not controlled by said Federal Act.

The motion for rehearing is overruled (Rec. 130-1).

In substance, as we construe these opinions, it is held that an employee of a railway performing duties about a train coming into Texas from Oklahoma bearing commerce is not engaged in interstate commerce, unless that commerce so coming into Texas was destined to some other state, and the facts not showing that the commerce arriving from Oklahoma into Texas was destined to some other state, that Seale was not engaged in interstate commerce; that if Seale was engaged in interstate commerce at the time of his death that his relatives could prosecute and maintain a suit on account of his death under a state law, unless the federal law was plead and that the federal law was not plead in this case, and that under the facts of this case the beneficiaries, who had sustained damages by reason of Seale's death, could maintain this suit. Petition for writ of error was presented to the Supreme Court of Texas to review this case, and it declined to take jurisdiction of the same, and defendants in error assert that this court is without jurisdiction, and pray that this cause be dismissed for the following reasons:

Motion of Defendant in Error to Dismiss.

Now comes defendants in error and move the court to dismiss this cause for the want of jurisdiction, because the record discloses:

1. There is no petition for writ of error from the Texas Supreme Court to the Texas Court of Civil Appeals, hence it does not appear that the plaintiff in error undertook to have the case reviewed by the highest state court. If, in fact, a petition for writ of error from the Texas Supreme Court to the Texas Court of Civil Appeals was actually filed, its absence from the record fails to disclose to the court whether or not the matters on which plaintiff in error relies to give this court jurisdiction were passed on by the Texas Supreme Court, the highest appellate court of said state.

2. At the time of the granting of the writ of error by a justice of this court, there was no final judgment in this case in the state court such as would authorize the removal of the cause from the state court to this court under Section 709 of the United States Revised Statutes.

3. In the trial of the cause in the state court, no issue was determined involving the construction of what is known as the Federal Employers' Liability Act; therefore its validity was not determined by the state court, nor was it construed by said court. It is by reason of said act that plaintiff in error claims jurisdiction in this court.

4. The construction of the Federal Employers' Liability Act was not plead nor raised in the state court in the manner required by the practice of the Texas courts and the decisions of its appellate courts thereon.

5. Said cause was decided upon other issues independent of the construction of the Federal Employers' Liability Act which issues were sufficient upon which to base the judgment of the state court.

I.

It is neither necessary nor proper to encumber the record in this case with the petition to the Texas Supreme Court for writ of error to the intermediate Appellate Court in order to show the jurisdiction of this court.

The writ of error in this case was to the Texas Court of Civil Appeals, an intermediate appellate court, the highest court in which a decision *was* had of the questions involved in the case, and the court which is the custodian of the record. The Supreme Court of Texas has supervisory jurisdiction over the Courts of Civil Appeals; application is made to the Supreme Court for a writ of error to the Court of Civil Appeals, and the Supreme Court takes jurisdiction of a case by granting the writ, or declines jurisdiction by refusing it. In this case application was made to the Supreme Court for a writ of error. It was refused. This application was not secured from the Supreme Court, and is not embodied in the record in this case, but the following order is:

In the Supreme Court of Texas, St. Louis, S. F. & T. Ry. Co. v. Maude Seale et al. From Grayson County, 5th District. October 16, 1912.

This day came on to be heard the application of St. Louis, S. F. & T. Ry. Co. for a writ of error

to the Court of Civil Appeals for the Fifth District, and the same having been duly considered, it is ordered that the said application be refused. That the applicant, St. Louis, San Francisco & Texas Railway Company and its sureties, J. G. Waples and W. G. Newby, pay all costs incurred on this application (Rec. 130).

In *W. U. Tel. Co. v. Crovo*, 220 U. S., 364, two writs of error were sued out; one to the trial court, the other to the appellate court that denied writ of error. This court said:

"The plaintiff in error has sued out two writs of error, one to the law and equity court of the City of Richmond, the trial court, and another to the Supreme Court of Appeals of Virginia. Inasmuch as the latter court denied a writ of error, the judgment of the law and equity court was the highest court of the state to which the cause could be carried, and a writ will, therefore, lie to that court, if a federal question is properly saved."

In *Norfolk & S. Turnpike Co. v. Virginia*, 225 U. S., 267, a writ of error issued to the Supreme Court of Appeals of Virginia to review a judgment, refusing a writ of error to review an order of a Circuit Court in that state. The Appellate Court stated in its order refusing the writ of error that it refused to review the judgment because it was "plainly right." This court, after referring to the *Crovo* case, and *Gregory v. McVeigh*, 23 Wall., 294, which are not in exact accord, declares the rule to be that the face of the judgment is the

criterion resorted to in determining the principles of finality of the judgment sought to be reviewed, and declared:

"For the guidance of suitors in the future we now state that from and after the opening of the next term of this court where a writ of error is prosecuted to an alleged judgment, or a decree of a court of last resort of a state, declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo case, and shall, therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

In *La. Nav. Co. v. Oyster Commission of La.*, 226 U. S., 99, where writ of error was sued out from this court to the Supreme Court of Louisiana to review a judgment of that court remanding the case in part for further proceedings, and in which it was contended that in some respects the judgment was final. This court in entertaining the motion to dismiss used this language:

"Indeed, it has been pointed out that the confusion and contradiction which inevitably arose from resorting to the state law for the purpose of converting a judgment not on its face final into one

final in character was the dominating reason leading to the establishment of the principle that the form of the judgment was controlling for the purpose of ascertaining its finality."

From these authorities we deduce the conclusion that for the purpose of jurisdiction of this court in this case, the judgment of the Court of Civil Appeals being final, and the writ being brought to that court, that it is only important to show that the Supreme Court of Texas refused writ of error, and declined to take jurisdiction of the case; and that the order of the Texas Supreme Court is sufficient evidence of that fact. This court is concerned in knowing that writ of error was refused, but not in the details of why it was refused.

But it is insisted that in the absence from the record in this court of the petition for writ of error to the State Supreme Court that this court does not know whether the federal questions here presented were presented and passed on by the State Supreme Court or not. It is our insistence that it is not necessary to do this directly, but if the questions are involved in the case, and the State Supreme Court declined jurisdiction of it the requirements of this court for jurisdictional purposes are met.

However, if it be necessary that this court determine from the record that the federal questions, relied on in this court, were passed on by the State Supreme Court, we submit that this sufficiently appears. Article 1540, Texas R. S., provides for writ of error; Article 1542, Texas R. S., provides for the record of the Court of Civil Appeals to be sent to the State Supreme Court

with the petition for writ of error. Rule 1 promulgated by the State Supreme Court provides that the application for a writ of error shall consist of assignments, propositions, statements, authorities—in fact, a brief presenting the case to that court. Said Rule 1 further provides that “the statement of the case by the Court of Civil Appeals, their conclusions of fact and law and their opinion will be read in connection with the application” for writ of error. It is presumed that the statute and rules of the State Supreme Court were followed in the disposition of the application for writ of error in this case. It is fair to conclude that when the same was refused that the State Supreme Court was fully advised of the federal questions in this case, and the decision of the same by the Court of Civil Appeals.

As a further answer to the first ground on the motion to dismiss we assert that the application for writ of error to the State Supreme Court is no part of the documents belonging to or the records of the Court of Civil Appeals, and is not reached by a writ of error addressed to that court where the final judgment was rendered. In addition to the presumption that obtains that an application to the Texas Supreme Court is a document kept in the archives of that court, Rule 4 of the Texas Supreme Court provides that when a writ of error is refused that the record of the case and the papers that belong to the Court of Civil Appeals shall be returned to the clerk of that court, “but shall retain the petition for writ of error.” Section 997, U. S. R. S. provides:

"There shall be annexed to and returned with any writ of error for the removal of the cause at the day and place therein mentioned an authenticated transcript of the record, and an assignment of errors, and a prayer for reversal with a citation to the adverse party."

We submit that the "authenticated transcript" of the record referred to in this section is all the record in the court to which the writ of error is addressed, and that there has been a compliance with this statute in this case.

For these reasons we submit that the first ground of the motion to dismiss is without merit.

II.

The judgment sought to be reviewed in this case was a final judgment in the suit in the highest court in Texas in which a decision in the state could be had, and the writ of error was seasonably brought.

Section 709 U. S. Revised Statutes authorizes a writ of error from this court to review a final judgment in any suit in the highest court of the state in which a decision in the suit could be had where certain federal questions are involved; Section 1003 provides that the same procedure shall obtain as to writs of error running from this court to state courts as obtains in such writs running to subordinate federal courts; Section 1008 provides that no judgment shall be reviewed in this court unless the writ of error is brought within two years after the entry of the judgment sought to be reviewed.

On May 12, 1910, in the District Court of Grayson County, Texas, judgment was rendered in usual form for defendants in error against plaintiff in error for sums aggregating eleven thousand (\$11,000.00) dollars (Rec. 20). On June 15, 1912, in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, the following judgment was rendered:

This cause came on to be heard on the transcript of the record and the same being inspected, because it is in the opinion of the court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, Maude Seale, F. H. Seale and J. E. Seale, do have and recover of appellant, St. Louis, San Francisco & Texas Railway Company and J. G. Waples and Wm. G. Newby, its sureties upon appeal bond, the amount adjudged below and all costs in this behalf expended and this decision be certified below for observance (Rec. 120).

A judgment is final for the purpose of a writ of error to this court, which disposes of the entire controversy between the parties. *Mower v. Fletcher*, 114 U. S., 126; *LaBourgogne*, 210 U. S., 112. Tested by this rule the judgment of the Court of Civil Appeals in this case is a final judgment to which a writ of error will lie.

But not only must the judgment be final, but it must be the final judgment of the highest court in the state in which a decision of the federal questions involved could be had. The question arises, was the Court of Civil Appeals the highest court in Texas in which a de-

cision of the questions here presented could be had? The laws of Texas provide a supervisory jurisdiction in the Supreme Court of Texas over judgments rendered by the Courts of Civil Appeals, and the Supreme Court is permitted to take jurisdiction over cases pending in the Courts of Civil Appeals and revise their decisions. In this case application was made to the Supreme Court to exercise jurisdiction and revise the decision and judgment of the Court of Civil Appeals, and that court by an order on October 16 refused said application (Rec. 130).

If the case cannot be taken to the highest court of a state except by leave of the court, a refusal to grant leave makes the judgment of the lower court subject to review, *Stanley v. Schwalby*, 162 U. S., 255; *Bergemann v. Backer*, 157 U. S., 659; *Gregory v. McVeigh*, 23 Wall., 294, the record must disclose this refusal, *Bacon v. Texas*, 163 U. S., 215; *Fisher v. Carrico*, 122 U. S., 523; *W. U. Tel. Co. v. Crovo*, 220 U. S., 364; *Mullen v. W. U. Beef Co.*, 173 U. S., 116.

So we assert that the judgment of the Court of Civil Appeals, to which the writ of error in this case runs was a final judgment and was a judgment of the highest court in Texas in which a decision of the questions involved in this case could be had.

The second ground of the motion to dismiss is that the writ of error is prematurely brought. An examination of the cases of this court discloses many in which complaint is made at delay in bringing writs of error, but this case seems to stand alone in complaint at the expedition displayed in bringing this writ. The motion

seems to proceed on the idea that the order of the State Supreme Court refusing writ of error is the judgment sought to be reviewed. We contend that that order is not such a judgment as can be reviewed, and that it was only necessary to embody the same in the record for the purpose of showing that the judgment of the Court of Civil Appeals, to which the writ of error runs, was the judgment of the highest court in which a decision of the questions involved could be had.

But it is said that the order of the Supreme Court of Texas refusing writ of error was not final until fifteen days after it was made, and that the writ of error in this case was brought before the fifteen days expired, and was premature. In reply to this we say, first, that this is not true in fact.

The order of the Supreme Court of Texas refusing writ of error to the Court of Civil Appeals was made October 16, 1912. The record does not disclose when the writ of error out of this court was served on the state court, but does show that the petition for that writ was filed in the state court on Nov. 5, 1912 (Rec. 132) and the supersedeas bond to this court was filed in the state court on Nov. 5, 1912 (Rec. 137). Presumably the writ of error was served at the same time these papers were by it filed. U. S. R. S. Sec. 1007.

A writ of error is not *brought* under the terms of the statutes regulating them until served in the court whose judgment is sought to be reviewed, *Polleys v. Black R. I. Co.*, 113 U. S., 81; *Brooks v. Norris*, 11 How., 204; *Mutual Life Ins. Co. v. Phinney*, 178 U.

S., 334. Hence we assert that if there be merit in the proposition that a writ of error cannot be prosecuted to a judgment until the time allowed for a motion for new trial has elapsed, that such time had elapsed and the writ of error was brought in this case.

In the next place it was not necessary to wait the fifteen days in which the record was held by the Supreme Court of Texas after denying a writ of error, before suing out a writ of error in this court. Defendants in error quote Article 1554, Texas Revised Statutes providing that judgments of the Supreme Court are not final until fifteen days after they are rendered, and base an argument thereon. This article is utterly without application here and is misleading. In the Revised Statutes of Texas, 1911, title 31 contains the provisions relative to the Supreme Court; Chapter 6 of that title contains the provisions as to writ of error, Chapter 9 those as to judgments of the court, and Article 1554 is embraced in this chapter, Chapter 10 provides for motions for rehearing, the last two chapters, from the expressions used therein, are clearly applicable to cases in which the court has taken jurisdiction and decided the cases and not to orders refusing writs of error. There is no statute providing for motions for rehearing of petitions for writs of error, but it is provided by Rule 4 of the court and in that rule the filing of a motion for rehearing of a petition for writ of error is not a matter of right the court will decline to consider it unless it embraces new grounds for the issuance of the writ, or new authorities not presented in the original petition for writ of error.

The motion for rehearing here provided for is like the character of motion permitted in the federal courts. Writs of error from this court can only be presented to review final judgment, whether it be the judgment of the state or federal court, but in no case, so far as we know, has it ever been held that it is necessary to file and dispose of a motion for new trial before the writ will lie. While it is a principle of universal application that courts have jurisdiction over judgments rendered by them during the term at which they were rendered to modify or set aside such judgments in no case has this court held that a writ of error was premature because brought before the term of the court at which the judgment was rendered had expired.

Orders on motions for rehearing are not subject to review on error in this court. *Harrison v. MaGoon*, 205 U. S., 501.

A motion for rehearing supersedes the finality of a judgment until it is disposed of. *Memphis v. Brown*, 94 U. S., 15, but in *Harrison v. Magoon*, 205 U. S., 501, where the statute authorizing this court to review judgments of the Supreme Court of Hawaii went into effect, after the judgment was rendered, but before a motion for rehearing seasonably filed was acted on this court declined jurisdiction.

In *Conboy v. Bank*, 203 U. S., 141, an appeal in bankruptcy not prosecuted in time from the order, but in time from the overruling of the motion for rehearing was dismissed. The general rule is that writ of error can be brought at any time after the entry of the final

judgment. *Sillsby v. Foote*, 20 How., 295; *Polleys v. Black, R. I. Co.*, 113 U. S., 81; *Commissioners v. Gorman*, 19 Wall., 661.

Courts retain control of their judgments until their jurisdiction is lost, even where an appeal is allowed they retain jurisdiction until the appeal is perfected. *Aspen M. & S. Co. v. Billings*, 150 U. S., 35, but if in term time when an appeal is perfected or a writ of error brought they lose that control. *Keyser v. Farr*, 105 U. S., 267; *Draper v. Davis*, 102 U. S., 371. Counsel for defendants in error quotes from *Aspen Mining Co. v. Billings*, 150 U. S., 37:

"The rule is that if a motion or petition for writ of error is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purpose of the writ of error or appeal."

While if a motion for rehearing of petition for writ of error in the Texas Supreme Court had been presented it doubtless would have been necessary to wait until it was disposed of before this writ of error could be brought, it is a full answer to the proposition implied in the quotation to say that no such motion for rehearing was filed. We contend that as it was necessary to show that the judgment sought to be reviewed was the judgment of the highest state court in which a decision could be had, that from and after the date of the refusal of

writ of error by the Texas Supreme Court it was proper to bring writ of error from this court.

Again, the fifteen days allowed by the rule of the Texas Supreme Court, within which to file motion for rehearing of petition for writ of error, was for the benefit of plaintiff in error. It was in the power of plaintiff in error to waive this privilege, or in fact any other right it had under the law. *Pierce v. Somerset R. Co.*, 171 U. S. 641; *Shutte v. Thompson*, 15 Wall. 151. The suing out of writ of error from this court was a waiver of fifteen days given it in which to file motion for rehearing. Under the circumstances we submit that it was proper to take steps to bring writ of error to supersede the judgment of the state court before mandate and execution were issued to enforce it, and that the second ground of the motion is without merit.

III.

In this case rights under a federal statute were duly set up in the State Court and were denied by the judgment sought to be reviewed.

So plain is the proposition that rights under federal law were properly set up and denied in this case from the statement of the case that it appears to be a useless consumption of time to discuss it, and we would not but for the earnest insistence of defendants in error to the contrary that an employe running to meet a train bearing commerce moving from the State of Oklahoma to the State of Texas to take the numbers and seals of the cars

for the purpose of keeping the records of such transportation and properly directing and conducting the same is engaged in interstate commerce. That a cause of action arising for damages on account of the death of such employe is governed by the Federal Employers' Liability Acts. That a cause of action by that statute is not given to the relatives of deceased, but to a representative of his estate. That where such employe leaves a widow as in this case, under no circumstances are his parents entitled to recover anything on account of his death. These are rights under a federal statute. They were set up by requested instructions asked in the trial. They were urged at every stage of the proceedings, were passed on by the Court of Civil Appeals, and at every stage of the proceedings were denied.

In *St. Louis, I. M. & S. F. R. R. Co. v. Taylor*, 210 U. S. 293, this court, citing many authorities, says:

"Where a party to litigation in a state court insists by way of objection to, or requests for instructions upon a construction of a statute of the United States which will lead, or on possible findings of fact from the evidence may lead to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States, and it has been denied to him. Jurisdiction so clearly warranted by the constitution and so explicitly conferred by the Act of Congress needs no justification."

In *Erie Railroad v. Purdy*, 185 U. S. 153, this court says:

"If the highest court of the state by its final judgment sustains the validity of the state enactment drawn in question there as repugnant to the constitution, treaties or laws of the United States, or denies a right, privilege or immunity specially set up and claimed in that court for the first time under the constitution or any treaty, statute or authority exercised under the United States this court could review that judgment, although no federal question was distinctly raised or insisted upon in the trial court."

See also:

Nutt v. Knut, 200 U. S. 13.

Ill. C. R. R. Co. v. McKendree, 203 U. S. 514.

It is not necessary in order to set up a federal right that it be asserted in the pleadings.

Sweringen v. St. Louis, 185 U. S. 45.

Erie R. R. Co. v. Purdy, 185 U. S. 152.

E. T. V. & G. R. Co. v. Frazier, 139 U. S. 288.

On these authorities we rest the proposition that it was not necessary for the rights asserted by plaintiff in error under the Federal Employers' Liability Acts to have been set up in its answer in the trial court as contended by defendants in error in their third proposition.

IV.

The federal questions involved in this case were presented in the State Court in a way so far in compliance with the rules of that court, that they were decided and with sufficient compliance with the rules of this court to authorize their review.

To the contention that the questions in this case were not raised in the manner required by the Texas practice we assert that in the first place, the due assertion of federal rights in the Texas courts is not essentially one of Texas practice. Whether rights under a federal statute were sufficiently brought to the notice of the state court and were involved in a decision of such court is a federal question, which federal courts will determine. In *Carter v. Texas*, 177 U. S. 447, it was contended as in this case, that a federal right was not asserted in the time and manner required by the state law, the court said:

"The question whether a right of privilege claimed under the constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of the state court is itself a federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state."

To the same effect:

Eric R. R. Co. v. Purdy, 185 U. S. 152.

Boyd v. Nebraska, 143 U. S. 135.

Incidentally the same proposition is involved in *Kansas City S. R. Co. v. Albers*, 223 U. S. 573.

In *Building & Loan Association v. Brahan*, 193 U. S. 646, the State Supreme Court refused to consider the federal questions because not raised in time and the proper way under the state practice, there as here, the pleadings of the defendant was the general issue. Authority to amend had been denied the defendant. Charges were requested presenting federal rights, which were refused, because not justified by the pleadings under the state practice. In answer to the same contention that is made here this court said:

"Upon the ruling of the court upon the amendments to the notice we are not called upon to express an opinion, but we think it is very clear that plaintiff in error was entitled to claim rights under the constitution of the United States based upon the case as presented. And if the rights asserted actually existed plaintiff in error was entitled to an instruction directing a verdict in its favor. The claim was, therefore, made in time."

This case is decisive of the proposition that plaintiff in error is in no way concluded in the assertion of its federal rights because it did not plead the Federal Employers' Liability Acts.

This case is not like those cases wherein this court has declined to review a judgment of an appellate state court which did not pass on federal questions, because they were not raised in the trial court, or not properly brought before it on appeal as in

C. & O. R. Co. v. McDonald, 214 U. S. 191;
Hulbert v. Chicago, 202 U. S. 270;
Erie R. Co. v. Purdy, 185 U. S. 151.

In the second place, the federal questions in this case were presented to the trial court in a way that they were passed on there, and in the state appellate court whose judgment is sought to be reviewed in such a way that they were decided there, and this meets the requirements of this court as to such rights being "specially set up and claimed."

It has been frequently held to be a sufficient compliance with the words "specially set up and claimed," that the questions were considered in the opinion of the state court, and ruled against the plaintiff in error.

San Jose L. & W. Co. v. San Jose, R. Co., 189 U. S. 180.

Kentucky Union Co. v. Kentucky, 219 U. S. 158.

Mallett v. North Carolina, 181 U. S. 589.

Fire Association v. New York, 119 U. S. 110.

Gross v. U. S. Mortgage Co., 108 U. S. 477.

Murdock v. Memphis, 20 Wall, 590.

E. T. V. & G. R. Co. v. Frazier, 139 U. S. 288.

Taking the opinion of the Court of Civil Appeals originally (Rec. 118), and on hearing (Rec. 129), in their inverse order it is held that the facts of this case do not bring it within the purview of the federal statute.

Inferentially that an employe engaged in performing duties in connection with a train bearing commerce arriving in Texas from Oklahoma is not engaged in interstate commerce, or that a cause of action arising from his death is governed by the state statute, notwithstanding that fact. The original opinion denies the ap-

plicability of the federal statute, but rests the decision on the proposition of pleading. As to whether that decision is right depends upon the proper construction of the Federal Employers' Liability Act, and the construction of that act is ultimately in the hands of this court.

In the third place, the federal questions in this case *were* presented in accordance with the principles and rules of law as announced by the Texas courts. We will hereinafter contend, in the discussion of the merits of this case, that this court has decided that a person engaged as deceased was at the time of his death, was engaged in interstate commerce; that a cause of action for his death is governed by the Federal Employers' Liability Act; that that act supersedes state statutes as to persons coming within its terms; that that statute gives a cause of action to the personal representative of the deceased, and to no one else, and that such personal representative is a *necessary* party to a cause of action under that statute; that a state court is without authority to apply a state statute to a subject of federal jurisdiction, governed by a federal law, and that question is not one of pleading, and that Congress did not give any rights to the parents of a man killed in railroad service where he left a widow. These principles, federal in character, are a part of the law governing not only the federal courts, but the state court in this case.

There is no novel application of the rules of pleading so far as the question here involved is concerned that is peculiar to Texas; the general principles of the common law apply.

Under the federal statute a personal representative of the estate of the deceased is a necessary party; under the Texas death statute the beneficiaries may sue; under the Texas statute the parents are beneficiaries; under the federal statute they are not. The petition of defendants in error in this case avoids the allegation of any fact that would indicate under which statute a recovery is sought. The proof shows interstate commerce, and the applicability of the federal statute.

While doubtless the question as to proper parties must be raised in the trial court by a plea in abatement, not so as to necessary parties. It was competent under a general denial to show facts that would disclose that a necessary party plaintiff was not joined at any stage of the proceedings.

In *Blair v. Cisneros*, 10 Tex. 40, where a question like the one here presented was under consideration Chief Justice Hemphill said:

"The testimony was received without objection, and in fact was admissible under the general issue. The facts went to show that the property was not open to administration; that it had, by law, vested in the heirs, and that the appointment was consequently a nullity, and these are objections to the foundation of the action, and in fact, to the validity of the entire proceedings."

In *Holliman v. Rogers*, 6 Tex. 97, Justice Lipscomb says:

"Should it be said that a defect of parties can only be taken advantage of by plea in abatement,

the answer is that the general rule, that exceptions to parties, should be taken advantage of by a plea in abatement, giving to the party a better writ, is subject to exceptions; and one of these exceptions is that a defendant may take advantage of such defect in a party plaintiff on the trial, if it should appear from the evidence, although not pleaded. Not so, however, as to ~~and one~~ ^{writ} of proper parties defendant. This, the defendant must show by his plea and give the names of the parties that should have been joined with him. If, however, the evidence went to show that the plaintiff in the suit had not merely presented his writ defectively, but that he had no right at all in any form of presentation it would seem that it was admissible under the ~~ap-
pro-~~ in bar."

In *Hanner v. Summerhill*, 26 S. W. 908, Justice Rainey of the Court of Civil Appeals, said:

"We thought it well settled that in actions upon joint contracts, all persons in whom the right of action exists must be made parties thereto; and the failure to make them such will prove fatal to the right to recover, whether the defendant pleads such want of parties in abatement or not, the failure to make the necessary parties plaintiffs to an action on a joint contract will be considered on appeal by this court if brought to its notice, whether the defendant plead the want of parties below, as it is fundamental error."

To the same effect:

Stachly v. Pierce, 28 Tex. 328.

Anderson v. Chandler, 18 Tex. 426.

In *Ebell v. Bursinger*, 70 Tex. 122, in a suit to cancel a deed made to defendant for the benefit of his daughter, the daughter was not made a party defendant; the court held that she was a necessary party; the proposition was not presented until after judgment by default, and was then overruled by the trial court. On appeal Justice Gaines said:

"We come then to the second question: Can the objection that there is the want of a necessary party be taken after a judgment by default? This question must also be answered in the affirmative."

"In *Anderson v. Chandler*, 18 Tex. 436, Chief Justice Hemphill recognized the doctrine that the objection is good upon a writ of error when the defect appears upon the face of the petition. The defect, however, did not so appear in that case, and the point was not decided. The principle there recognized is that generally adopted in the common law courts."

Again, if we treat the defendants in error's case as being under the Texas death statute it was competent to show interstate commerce under the general issue in order to show that their case was not made out and that the statute was not applicable. It is a principle of universal application that where a suit is based on a statute, as in this case, and a general denial or the general issue pleaded that it is necessary for the plaintiff in ~~error~~ ^{under} to make out his case to show that he comes within the provisions of that statute, and under the general issue it is certainly competent to show where one of the neces-

sary ingredients of plaintiff's case is that a deceased person was engaged in intrastate commerce that he was engaged in interstate commerce.

In *Willis v. Hudson*, 63 Tex. 682, it is held that a general denial puts plaintiff upon proof of necessary allegations of his petition.

In *Altgelt v. Emilienburg*, 64 Tex. 151, it is held that defendant in a suit for breach of contract, under a general denial, may prove non-performance.

In *Security Mortgage Company v. Caruthers*, 32 S. W. 842, it is held that a defendant under a general denial in a suit on a mechanics lien may show its invalidity.

It is a general principle that in order to sustain a suit based on a statute that it is incumbent on the plaintiff to bring himself within the terms of the statute, and we think it follows that any fact that shows that the statute is not applicable to him is a defense under the general issue.

In *Poole v. Tyler*, 94 U. S. 518, it is held that a person claiming peculiar rights under a statute must bring himself under the statute.

In *Schlemmer v. Railway*, 205 U. S. 8, it is held that it is incumbent on a person claiming the benefits of an exception in a statute must by proof bring himself within such exception.

In *U. S. v. Perryman*, 100 U. S. 235, it is held that a person claiming rights under a statute must bring himself within the terms of the statute.

These are the general authorities applicable to the proposition here presented by defendants in error. The exact proposition, as applicable to the Federal Employers' Liability Act, has not been passed on by the Texas Supreme Court, but it has been passed on by two of the Texas Courts of Civil Appeals.

In *Gulf C. & S. F. R. Co. v. Lester*, 149 S. W. 841, the Court of Civil Appeals of the Third District had under consideration questions involved in this case. The plaintiff in that case brought suit as surviving widow and as next friend for the minor daughter against the railroad for damages on account of injuries resulting in the death of her husband. The pleadings evidently did not indicate whether he was killed in interstate or intrastate commerce. The railroad excepted to the petition and plead in bar of the action that plaintiffs were not entitled to recover because at the time of the accident the deceased was an employe of the railroad and was engaged in interstate commerce. The trial court overruled the exceptions and special plea and refused to give special charges asked by the railroad directing a verdict in its favor on the ground that plaintiffs were not entitled to maintain the suit because the evidence showed that the railway company at the time of the accident was engaged in interstate commerce, and the deceased was employed by it. Did the court err in refusing to sustain said plea, or in declining to so charge the jury? Is a question which that court proceeds to discuss. Construing the Federal Employers' Liability Act the court holds that that statute gives a cause of action alone to the personal repre-

sentative of the deceased; that where the deceased is engaged in interstate commerce that the state death statute is superseded and that the plaintiff could not maintain the suit. It was next contended in that case, as it is contended here, that the proposition was not presented in time, that the railroad waived its right to insist upon the defense because it first answered the merits and subsequently set same up by amendment, in discussing that proposition the court said:

"We do not believe this contention is sound, for the reason that after the federal enactment upon the subject no right of action whatever in this character of cases could have been based upon the state statute, and it was just as though the state statute was not in existence. Appellant's liability existed by reason of the federal statute alone, there being no common law liability. This being true, the right of action is wholly and entirely dependent upon the statute itself. While the plaintiff and her minor children were named as beneficiaries therein, still the cause of action arising out of the *liability of appellant under the statute was given to the personal representative of the deceased, and not to said beneficiaries*. This being true, it seems to us that it follows that no one, except said representative, could maintain the suit. If this were not true, then the defendant might be harassed with several suits, brought by different beneficiaries, as well as by the administrator or executor of the deceased. If the suit had been instituted and prosecuted to judgment by the beneficiaries, we do not believe that it would bar another suit brought by the personal represen-

tative of the deceased. In fact, such has been the holding of the Supreme Courts of Indiana and Alabama upon this subject. See *C. C. C. & St. L. Ry. Co. v. Osgood*, 36 Ind. App. 34, 73 N. E. 285; also *L. E. & W. Ry. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923. In the case of *Yelton v. E. & I. Ry.*, 134 Ind. 414, 33 N. E. 629, the personal representative of the deceased filed suit. The railway company pleaded that it made settlement with the widow, who was the only heir of the deceased. The plaintiff demurred to this answer, and the Supreme Court of Indiana, in passing upon the question thus raised, disposed of it on the following reasoning: 'The damages recovered inure to the exclusive benefit of the widow and children of the deceased. In this case, there being no children, the damages would inure to the sole benefit of the widow; but she could not prosecute the action. It must be prosecuted by the administrator. This being true, if the widow can compromise the cause of action and release the damages, so as to terminate the suit, it places the administrator in the anomalous position of having the sole right to prosecute the action, and gives to the widow, or widower, or children, if there be children, the right to compromise the action out side of the court, and cancel the claim for damages upon which the action is based. While it would give to the administrator the sole right to prosecute the action, yet he would not have the sole right to control the prosecution of the action, once commenced. It would seem that the law which authorizes a person to prosecute an action would give to him, by necessary implication, the right to control such prosecution, and not permit one, not a party to the action,

and having no right to be a party to the action, to compromise the action. While the actions under this section of the statute are prosecuted for the benefit of, and the damages inure to, the exclusive benefit of the widow and children of the deceased, yet it contemplates the collection of the damages by the administrator and turning the same over to the widow and children on final settlement."

And reversed and dismissed the case.

In *Kansas City M. & O. R. Co. v. Pope*, 152 S. W. 185, which was a case before the Court of Civil Appeals for the Second District of Texas, the plaintiff was the widow of the deceased, and brought suit for herself and for the benefit of her minor children against the railroad. The pleading did not disclose whether the deceased was employed in interstate commerce or intrastate commerce. The railroad appears to have plead a general denial. The evidence disclosed interstate commerce. At the conclusion of the evidence the railroad asked an instructed verdict, which was refused. The Court of Civil Appeals, after reviewing the facts which showed that the deceased at the time of his death was engaged in interstate commerce, held that the trial court should have instructed a verdict for the defendant. After reviewing the provisions of the Federal Employers' Liability Act, the court says:

"It is well known that, independently of statute, no cause of action for injury resulting in death arises in this country. It is equally well settled on the highest authority that, where a state statute conflicts with an act of congress, the latter will prevail

as the supreme law of the land. Now a comparison of the Federal Employers' Liability Act with our state statute on this subject discloses a material conflict in this: That the state statute expressly authorizes any one or more of the beneficiaries under the act to maintain the suit, whereas, the federal act contains no such provisions. By that act no one in express terms is authorized to bring the suit, but the cause of action is given to the personal representative. No one else, therefore, can show a right to recover under the statute. It is not a mere question of capacity of parties, requiring a plea in limine, but is rather a question of liability at all. The recent case of *G. C. & S. F. Ry. Co. v. Lester*, 149 S. W. 841, by the Court of Civil Appeals for the Third District, presents a very satisfactory discussion of this subject, and is conclusive, as we understand its holding as against the right of appellee to maintain this suit. The reasoning of that opinion commends itself to us and on that authority, as well as reason, we sustained appellant's assignment that a verdict should have been instructed in its favor, and reversed the judgment and remanded the cause, with instructions to the trial court, if the evidence should be the same on another trial, to instruct a verdict for defendant."

This cause was again before the same court on rehearing, and reported in 153 S. W. at page 163. It was suggested to the court that its ruling in the original opinion in this case was erroneous under the views expressed by this court in *M. K. & T. Ry. Co. v. Wulf*, 226 U. S. 570, and the court held up the final disposition of this case

until access was had to the opinion in that case. After discussing that opinion and quoting at length from it the court says:

"We quote thus at length from the opinion in the Wulf case since we construe it in effect to uphold our former decision, and also as an authority for the proposition hereafter set forth held by a majority of us, which of itself further necessitates a reversal of the judgment herein. Since the enactment of the Federal Employers' Liability Act we have in force in this state two statutes covering the subject of liability of common carriers by railroad for negligently causing the death of a person. The federal act applies to those cases of common carriers by railroad 'while engaged in commerce between any of the several states or territories,' while the state act applies to those engaged wholly in intrastate commerce. Now the appellees' petition, which is very voluminous, apparently studiously avoids any reference whatever to the fact that appellant company at the time it caused the death of deceased was engaged in commerce between the states. On the contrary, it makes a perfect case as against all exceptions of liability under the state statutes. As it alleged a provable case under the latter statute, upon proper testimony the plaintiff undoubtedly would have been entitled to a judgment with apportionment to the several beneficiaries under that statute as she prayed. But, as pointed out in the original opinion, the proof shows a case of interstate commerce, and therefore supports a case not made by the petition. No judgment other

than one for the defendant could have been rendered since the case pleaded was not proved, and the case proved was not pleaded."

And overruled the motion for rehearing.

Under these last authorities, which are clear and pointed, as well as under general principles, we assert that the propositions here presented were duly presented in the Texas courts under the rules and practice prevailing in those courts.

Further, as to the contention that the State Courts, under local law, were not authorized to admit evidence to the effect that at the time of his death deceased was engaged in interstate commerce we will say that the evidence was admitted, was considered by the Texas courts, and is properly a part of the record in this case, and this court will not review the action of the State Courts in admitting it as this is not a federal question, but will treat the evidence as properly before the court.

We respectfully submit that there is no merit in the motion to dismiss this case on the ground that no federal questions were involved, presented and decided in this case in the State Court, and that the same is not properly before this court for review. The purpose of this motion seems to be to give, if possible, some color for a motion to dismiss and thereby secure, if possible, an earlier disposition of the case on the merits by attaching thereto a motion to affirm. We submit that there is no color to the motion to dismiss and strenuously insist that the writ of

error was not taken for delay only, and deny that the questions upon which the jurisdiction depends are so frivolous as not to need further argument within the rules of this court, and that such questions were not only "not so manifestly decided right that the case ought not to be held for further argument;" that the questions are of importance, are properly here and it is our insistence that a decision of them will result in a reversal of the judgment of the State Court.

BRIEF OF ARGUMENT ON THE MERITS.

I.

At the time of his injury and death deceased was an employe of a common carrier by railroad engaged in interstate commerce.

The Court of Civil Appeals states the facts as follows:

The deceased was run over and killed by a switch engine operated in the yards of appellant in Sherman, Texas. He was working under T. A. Gribble, who was chief clerk out at those yards and in charge of the same. Deceased's work was done in connection with the clerks in the yards, and with the switch crew. After a train was brought in, it was delivered to the switch crew. The first act was to obtain the numbers of the cars and make a record of them in the office, then the switch crew began the work of tearing the train up and making new trains. He got the numbers and initials of each car that came in and went out of the yards. When a train comes in the yards he goes out and gets the number and initials on each car and gets the seals that are on the car doors. Whatever impression is on the seal he keeps in his book that he carries. He gets the number of the train. ~~He gets the number of his train.~~ He gets the cars that are made out for this train according to the conductor's switch list. He puts the cards on the cars in order that the switchman may switch the train properly. After he

does that he goes in the office and checks his list, checks his book in the office with the train clerk and also enters his seals. It is done in order to keep records. A train was coming in from Oklahoma at that time. It was a freight train. The north Sherman yards were the terminal for that train. That is, that was the end of the run of that train. If any trains went south they were made up in the yards, new trains, and sent south, or other trains made up and sent north. The evidence does not show that any of the cars in the train coming in were destined for other points (Rec. 129-130).

In addition to this, Snyder testified that it was the duty of deceased to take the numbers and seals of the cars in trains as they came in; that a train was coming into the yards; that Seale left the office to take the numbers of the cars in the train; that deceased left in a hurry, and that half a minute later he saw him on the track dead (Rec. 102-3).

Winslett testified that just before his death deceased was in his office; that a train whistled in from the north; that deceased grabbed his yard book and lantern and said, "I will have to catch this train," and left the office in a run (Rec. 105-8).

The report of the conductor of the train shows that among other things the train contained ten cars of freight billed from points in Oklahoma to various points in Texas (Rec. between pages 110 and 111).

In going out to take the numbers of this train arriving in Texas from Oklahoma so that it could be switched deceased was engaged in interstate commerce.

Rhodes v. Iowa, 170 U. S. 412.

McNeill v. Southern Ry. Co., 202 U. S. 543.

Freeman v. Powell, 144 S. W. 1033.

Daniel Ball v. U. S., 10 Wall. 557.

Zikos v. Oregon R. & N. Co., 179 Fed. 893.

Colasurdo v. C. R. R. of New Jersey, 180 Fed. 832.

Interstate C. C. v. I. C. Ry. Co., 215 U. S. 452.

Gloucester Ferry Co. v. Penn., 114 U. S. 196.

Welton v. Mo., 91 U. S. 275.

Miller v. Goodman, 91 Tex. 43.

Houston D. Nav. Co. v. Ins. Co., 89 Tex. 1.

State v. G. C. & S. F. Ry. Co., 44 S. W. 542.

In *Rhodes v. Iowa*, 170 U. S. 412, an employe of a railway company who was engaged in trucking packages of intoxicating liquor from the platform of the railway company to the warehouse of the company, the intoxicating liquor having been shipped from the State of Illinois, was charged with moving intoxicating liquor in that state in violation of the Iowa law, and the court, in disposing of that contention, held that the packages were interstate commerce and did not lose their character as such until delivered to the consignees, and being interstate commerce were not subject to the laws of the State of Iowa.

In *McNeill v. So. Ry. Co.*, 202 U. S. 559, it is held that cars of coal originating in another state and being on the tracks of a railway in North Carolina were inter-

state commerce and not subject to the control of the state commission, for they remained interstate commerce until the freight was delivered to the consignees.

The evidence in the record is not very clear as to the character of freight in the train, but as to whether the cars were loaded at all or not we regard as unimportant.

In *U. S. v. Chicago & N. W. Ry. Co.*, 157 Fed. 619, it is held that the mere hauling of an empty car is engaging in commerce. In *Voelkner v. C. M. & St. P. Ry. Co.*, 116 Fed. 867, where the Federal Safety Appliance Act was under discussion the court adverted to the fact that many cars moved east with a load of freight and came back west empty, but the employes handling the empty cars west were as much engaged in handling commerce as when handling the same cars loaded east, and this opinion and expression is approved by the Supreme Court of the United States in *Johnson v. So. P. Co.*, 196 U. S. 1, and the opinion in this last mentioned case seems to support the contention also, but the undisputed facts are that in the case here presented the cars were loaded with freight. It is our contention that the train having come in from Oklahoma, that it was an interstate train, and that the parties working with that train were engaged in interstate commerce until the freight in the loaded cars was delivered to the consignees, and if there were empty cars in the train until the cars were placed on the proper storage tracks of plaintiff in error, until, at least, ~~by~~ all those acts connected with the interstate transportation were done, and the interstate transportation completed.

II.

The cause of action for damages for injuries resulting in the death of an employe of a common carrier by railroad, killed while engaged in interstate commerce is governed by the **Federal Employers' Liability Acts**, which, as to such cases supersede state statutes authorizing recovery for injuries resulting in death.

Mondou v. New York, N. H. & H. R. Co.,
223 U. S. 1.

American R. Co. v. Birch, 224 U. S. 547.

M. K. & T. R. Co. v. Wulf, 226 U. S. 570.

III.

Under the provisions of the **Federal Employers' Liability Acts** a cause of action for damages for injuries resulting in the death of an employe of a common carrier by railroad engaged in interstate commerce is given to the personal representative of deceased and the widow and parents of such deceased person cannot maintain a suit in their individual capacities.

Sec. 1 Employers' Liability Act of April 22,
1908.

35 Stat at L. 65, Chap. 149.

U. S. Comp. Stat. 1911, p. 1322.

Missouri, K. & T. Ry. Co. v. Wulf, 226 U. S.
570.

American R. Co. v. Birch, 224 U. S. 547.

The expression "personal representative" used in the statute means administrator or executor.

Briggs v. Walker, 171 U. S. 471.

Sec. 1 of the Employers' Liability Act of 1908 is as follows:

"That every common carrier by railroad while engaging"—in interstate commerce—"shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

American R. Co. v. Birch, 224 U. S. 557, was a suit for damages for injuries resulting in death brought by a widow and son in their individual capacities in Porto Rico, and the case is governed by a like provision of the statute here involved, which is applied to Porto Rico in Section 2 of the statute. The railroad moved to instruct a verdict for it upon the ground that the suit was not brought by any person authorized under the statute to bring the suit. The Porto Rican court, in disposing of the motion, said:

"The suit being brought under the Act of Congress of April 22, 1908, it is properly brought in the name of the only persons for whose benefit any

recovery could be had, and it is the opinion of the court that the words used in Sec. 2 of the Act in question, 'to his or her personal representative,' cannot be construed to mean that it is necessary, in cases where only the husband or wife could inherit and are the only survivors, that they be forced, in the absence of any estate belonging to the deceased other than his right to sue, to have an administrator appointed."

This court said:

"But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or, 'in case of his death * * * to his or her personal representative.' It is true that the recovery of the damages is not for the benefit of the estate of the deceased, but for the benefit 'of the surviving widow or husband and children.'

But this distinction between the parties to sue and the parties to be benefited by the suit makes clear the purposes of Congress. To this purpose we must yield. Even if we could say, as we cannot, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used.

And after discussing other matters concludes with:

"The national act gives the right of action to personal representatives only."

In *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S., 570, the deceased was a railroad employe killed while engaged in interstate commerce in Kansas. His mother, as sole beneficiary, in her individual capacity brought suit in the Federal Circuit Court in Texas. Before the trial, but more than two years after the death, the mother amended and made herself, as administratrix, a personal representative and party plaintiff and sought to prosecute the suit in that capacity. It was urged by the railroad that in her individual capacity the mother could not maintain the suit; that the making of herself a party plaintiff in her representative capacity as administratrix, was, in effect, the bringing of a new suit, and at the time such action was taken more than two years had elapsed since the cause of action had accrued, and that the same was barred by limitation. This court held that the amendment making herself a party plaintiff in her representative capacity, inasmuch as her original petition stated a good cause of action under the federal statute, was not a new case, and that the amendment related back to the filing of her original petition, and that the suit was not barred, but expressly held "that under the federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative."

The opinion of the Court of Civil Appeals, disposing of the motion for rehearing, which is the last and final decision of that court, rests the decision on the proposition that the federal statute is not applicable to the facts in this case and that the state statute applies. However, that court, in the original opinion, held, and counsel for defendants in error are insisting, that the provision of the federal statute as to the party entitled to sue ought not to be applied, because the objection to parties was not made in time; that plaintiff in error having appeared and answered to the merits that the objection to the parties plaintiff was not made in time. In other words, that this objection is an objection to the parties and should be made *in limine*. In reply to this we desire to call the attention of the court to the proposition that by special exception presented in due time defendants in error's petition was assailed because it did not show whether the suit was sought to be maintained under the federal law of the state law. It was the privilege of defendants in error to frame their petition as they saw fit, not being controlled in any particular by the desire of the plaintiff in error in reference thereto, but inasmuch as the procedure under the different laws, as well as the beneficiaries, were different, plaintiff in error sought to require defendants in error to plead such facts as would indicate on which law they relied, and the same was denied, and under these circumstances we contend that defendants in error are responsible, at least in a measure, for the failure of plaintiff in error to sooner object to the parties plaintiff, and under these circum-

stances there is no merit in this proposition asserted in answer to our claims in this case, this is adverted to as bearing on the timely assertion of federal rights. However, we contend that there is no merit in this proposition anyway. It is our contention that the federal statute gives a cause of action alone to the personal representative of the deceased, and that the question here involved is not one of defect of parties; but there is an absolute failure of proof in that the cause of action is given by the statute to the personal representative and the personal representative has not brought suit. That in order to entitle any one to a recovery for the death of the deceased, Seale, it was necessary that the personal representative bring the suit.

The announcements by this court in the Birch case, *supra*, that "the national act gives the right of action to personal representatives only," and in the Wulf case, *supra*, "that under the federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative," are broad and are hedged about by no provisos or exceptions and support this contention. The same view is supported by able argument and extensive citation of authority in the opinion of the Supreme Court of North Dakota in *Harshman v. Railway*, 103 N. W., 412; in the opinion of the Supreme Court of Iowa in *Major v. Railway*, 88 N. W., 816, and in the opinions of two of the Courts of Civil Appeals of Texas in *Railway v. Pope*, 152 S. W., 185, and 153 S. W., 165; and *Railway v. Lester*, 149 S. W., 841.

It is insisted as a reason for the denial of the fed-

eral rights asserted in this case that the federal statute was not pleaded in the state court. The cause of action, if any defendants in error have, is statutory and in order to maintain a suit under a statute it is incumbent on defendants in error to prove facts that will show them entitled to recover under the statute relied on. There is no allegation in defendants in error's petition that show whether at the time of the death of deceased he was engaged in interstate commerce or intrastate commerce. If we assume that the suit is brought under the state statute then it was incumbent by all rules of procedure for defendants in error to show that their case on account of the death of deceased is governed by that statute. This, defendants in error failed to do; they failed to show that deceased was engaged in intrastate commerce at the time of his death, and the proof shows that he was engaged in interstate commerce at the time of his death. The showing that deceased was engaged in interstate commerce was a showing of facts that prevented their recovery under the state statute, because when so engaged the state statute does not apply. If the petition be treated as one resting on the federal statute, defendants in error cannot maintain the suit, because the party, to-wit: the personal representative, to whom the federal statute gives a cause of action does not bring the suit, and the defendants in error have not brought themselves within the provisions of that statute. We contend that it is not necessary to have plead in this case that the deceased was engaged in interstate commerce in order to have shown those facts and defeated defendants in error's right to recover in this case.

IV.

A State Court is without power to apply a state law to a subject lying within the domain of federal jurisdiction which is regulated and controlled by federal law.

This proposition is a corollary to the principle that "the Government of the Union, though limited in its powers, is supreme within its sphere of action," which is an axiom in American jurisprudence.

In *Mondou v. N. Y. N. H. & H. Ry. Co.*, 223 U. S., 53, where this court was considering the validity and scope of the statute here involved, in answer to the question, whether its provisions supersede the laws of the states so far as the latter cover the same field this court said:

The question finds its answer in the following extracts from the opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat, 316:

'If any one proposition could command the universal assent of mankind, we might expect it would be this, that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: The people have, in express terms,

decided it, by saying 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.'

'This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them.'

And particularly apposite is the repetition of that principle in *Smith v. Alabama*, 124 U. S., 473.

'The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority.' "

Then after discussing those cases in which state statutes had been enforced over federal subjects, where Congress had not acted, said:

"And now that Congress has acted, the laws of the states, insofar as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

When the evidence disclosed that the man on account of whose death this suit was brought was employed by a railroad engaged in interstate commerce, then it appeared that the cause was governed by the federal statute, and it was the duty of the state court to apply it. Plaintiff in error had a right to presume that it would be applied. When its application was refused, at the request of plaintiff in error, rights under the federal statute were denied, and that denial cannot be justified by the claims of failure to meet niceties and refinement of pleading under local laws. The state courts were bound by the federal constitution and federal laws, and were without power to apply a state law to a cause of action arising under federal law, as was done in this case.

V.

Under the Employers' Liability Acts the Deceased having left a wife surviving him his parents in no capacity, either individual or representative, are entitled to recover for their own benefit.

The deceased left surviving him a wife, defendant in error, Maude Seale (Rec. 4), and his parents, F. H. Seale and J. E. Seale, defendants in error (Rec. 5), were permitted to recover one thousand (\$1,000.00) dollars each in this case (Rec. 20). The statute provides ~~that~~

in case of death for a recovery by the personal representative "for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents, etc." We submit that under this statute, that, where^{as} in this case the deceased left a surviving wife that the parents had no rights and are not entitled to any sum as beneficiaries and that the statute is susceptible of no other construction.

VI.

The judgment of the state court cannot be rested on non-federal grounds and could only be entered on a denial of the federal rights asserted.

On page 67 of the brief of the defendants in error it seems to be claimed that the judgment of the state court was rendered on non-federal grounds. We recognize that if this is true that the court will not disturb the judgment.

Seaboard A. L. R. v. Duvall, 225 U. S. 487.

But we insist that this proposition is not involved in this case. Plaintiff in error asserts that the deceased was engaged in interstate commerce; that the case was governed by the federal statute, and that under the federal statute the judgment could not be rendered. The state court denied interstate commerce, denied the application of the federal statute and rendered the judgment under the state statute, we submit, that it is idle to discuss this proposition.

In Conclusion.

The assignments of error made and relied on this court are as follows:

I.

The Court of Civil Appeals erred in holding that Memory T. Seale at the time of the injury, which caused his death, was not employed in interstate commerce, and that the cause of action for damages on account of his death was not governed by the Federal Employers' Liability Acts.

II.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The court erred in refusing to give to the jury special charge No. 13, requested by defendant:

The plaintiffs in this case are not shown to be legal representatives of the deceased, Memory T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant.

III.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The judgment of the court in favor of plaintiff, Maude Seale, is contrary to law, and to the evidence in this case, in that the undisputed evidence shows that the deceased, for whose death this suit is brought, was at the time of his death, engaged in interstate commerce and the right of said plaintiff, Maude Seale, to recover is

given by the Act of Congress relating to interstate commerce and to the liability of common carriers to their employes, and no right of action is given for the death to the wife of an employe killed while engaged in such commerce, but is given only to the personal representative of such deceased employe.

IV.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The court erred in refusing to give to the jury special charge No. 14, requested by defendant, as follows:

In no event are the plaintiffs, F. H. Seale and J. E. Seale entitled to recover any sum in this case.

V.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

The judgment of this court is contrary to law and to the evidence in this case insofar as the same is in favor of the plaintiff, F. H. Seale, in that the undisputed evidence shows that the deceased, Memory T. Seale, on account of whose death this suit is brought, was at the time of his death, engaged in interstate commerce, and the right of said plaintiff, F. H. Seale, to recover on account of said death is governed by the Act of Congress relating to liability of common carriers to its employes in certain cases, and no right of action is given by said

act to the parents of the deceased in case where the deceased left surviving him a wife.

VII.

The Court of Civil Appeals erred in not reversing and rendering the judgment rendered in this case by the trial court (Rec. 132-134).

From the numerous assignments presented to and that arise on the decision and judgment of the Court of Civil Appeals the foregoing are selected as sufficiently presenting the questions here relied on.

It is inferentially suggested by defendants in error that the requested charge, to the refusal of which complaint is made in assignment two, should not have been given because the expression "legal representatives" is used instead of the expression "personal representative" used in the federal statute, but we submit that this is hypercritical.

In *Briggs v. Walker*, 171 U. S. 471, this court says:

"The primary and ordinary meaning of the words 'representatives,' or 'legal representatives,' or 'personal representatives,' when there is nothing in the context to control their meaning is 'executor or administrator,' they being the representatives constituted by the proper court."

Citing authorities.

To the legal mind the expressions mean the same thing.

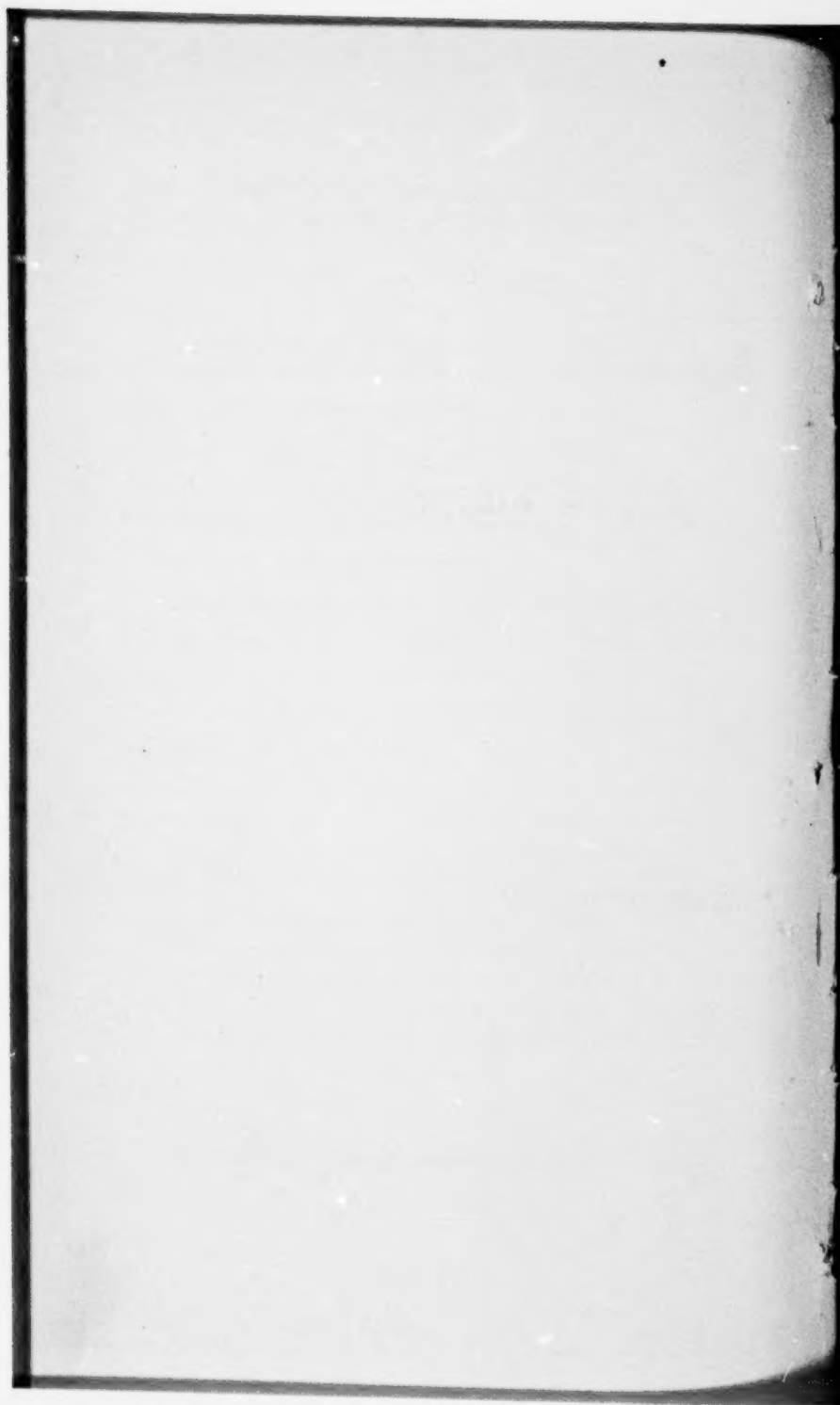
From the foregoing it follows that said assignments should be sustained, and that this cause ought to be reversed.

Respectfully submitted,

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.....
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Office Supreme Court, U. S.
FILED.

MAY 5 1913

JAMES H. McKENNEY,

CLERK.

NUMBER 857.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

ST. LOUIS, SAN FRANCISCO & TEXAS RAIL-
WAY COMPANY, PLAINTIFF IN ERROR,

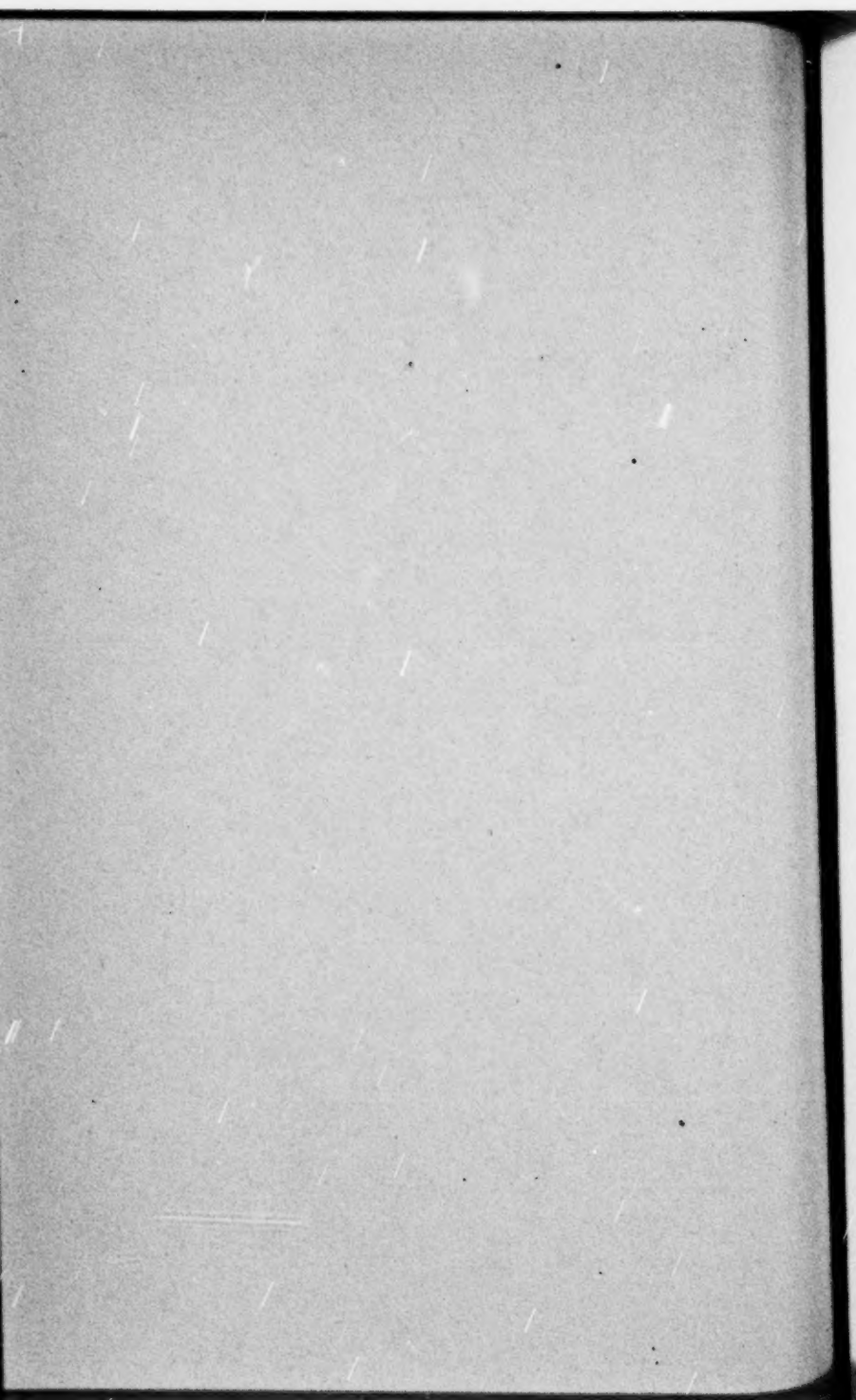
VS.

MAUDE SEALE, F. H. SEALE AND J. E. SEALE,
DEFENDANTS IN ERROR.

**BRIEF OF DEFENDANTS IN ERROR ON THE
MERITS.**

JUDSON H. WOOD,
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F. H. Seale and J. E. Seale,
Defendants in Error.*



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DEFENDANTS IN ERROR.

**BRIEF OF DEFENDANTS IN ERROR ON THE
MERITS.**

NOTE.

The court will observe that there is only one issue raised in this case, and that is the question of proper parties plaintiff in the trial court. We have presented that issue fully in the brief of defendants in error on the motion to dismiss or affirm, to which we refer the court. We will undertake to confine this brief to a reply to plaintiff in error's brief on the merits appended to its brief on its motion to dismiss or affirm.

I.

The Court of Civil Appeals of the State of Texas found that the facts surrounding the death of the deceased were such that the case was not controlled by the Federal Employers' Liability Act, and its judgment on that finding is conclusive under the Texas Statutes.

The original opinion of the Court of Civil Appeals on the affirmance of the case did not find the facts, but affirmed it upon the proposition that under the pleadings, there was no legal evidence that showed that the case was controlled by the Federal Employers Liability Act. (See Record 118-119). However, on overruling the motion for a re-hearing, that court found the facts as follows:

“Appellant insists that the facts of this case being within the Act of Congress approved April 22nd, 1908, known as the ‘Federal Employers’ Liability Act,’ and the same is controlled by its provisions. As said by Mr. Chief Justice Brown, in the case of *M. K. & T. Ry. Co. of Texas v. Blalack*, recently decided, ‘this court has never questioned that the Constitution of the United States and the laws enacted by Congress in the exercise of powers derived from that Constitution are superior to the laws of this on the same subjects.’ We are of the opinion, however, that the facts in this case do not bring it within the purview of the Federal Statute. The deceased was run over and killed by a switch engine operated in the yards of appellant in Sherman, Texas. He was working under T. A. Gribble, who was chief clerk out of those yards and in charge of the same. Deceased’s work was done in

connection with the clerks in the yards, and with the switch crew. After a train was brought in, it was delivered to the switch crew. The first act was to obtain the numbers of the cars and make a record of them in the office, then the switch crew begun the work of tearing the train up and making new trains. He got the numbers and initials of each car that came in and went out of the yards. When a train comes in the yards he goes out and gets the number and initials of each car and gets the seals that are on the car doors. Whatever impression is on the seal he keeps in the book that he carries. He gets the number of the train. He gets the cars that are made out for this train according to the conductor's switch list. He puts the cards on the cars in order that the switchman may switch the train properly. After he does that he goes in the office and checks his list, checks his book in the office with the train clerk and also enters his seals. It is done in order to keep records. A train was coming in from Oklahoma at that time. It was a freight train. The north Sherman yards were the terminal for that train. That is, that was the end of the run of that train. If any trains went south they were made up in the yards, new trains, and sent south, or other trains made up and sent north. The evidence does not show that any of the cars in the train coming in were destined for other points. Such being the evidence this case is not controlled by said Federal Act. The motion for rehearing is overruled" (Record 129).

In reference to the conclusiveness of the judgment of the Court of Civil Appeals on the facts, the Texas Statute is as follows:

“Article 1590. The judgment of the Courts of Civil Appeals shall be conclusive in all cases on the facts of the case.”

Our Texas Supreme Court, in numerous decisions not necessary to mention, has recognized that Statute, and is bound by the facts as found by the Court of Civil Appeals.

This court, in numerous decisions, has held that it, also, is bound by the findings of fact by the State Court.

G. C. & S. F. R. Co. v. Texas, 204 U. S. 411
51 L. Ed. 546).

Dower v. Richards, 151 U. S. 658 (38 L. Ed.
305).

Egan v. Hart, 165 U. S. 188 (41 L. Ed. 680).

Thayer v. Spratt, 189 U. S. 346 (47 L. Ed.
845).

Adams v. Church, 193 U. S. 510 (48 L. Ed.
769).

Clipper Min. Co. v. Eli Min. & Land Co., 194
U. S. 220 (48 L. Ed. 944).

II.

Independent of the finding of the Texas Court of Civil Appeals, the facts as shown by the record do not disclose that the cause of action arose under the Federal Employers' Liability Act.

Deceased was a yard clerk in the office of plaintiff in error in its railway yards at Sherman, Texas; was employed by T. A. Gribble, chief clerk (Rec. 109); and was under the direct supervision of Will Winslett, another clerk (Rec. 105). His duties, among other things,

required him to take the numbers on the cars in trains that came into the yards, bring them to the office and record them in a book. He was to work at nights, and was killed on the first night of his employment, by being run over by a switch engine while going to a train that had come in from the north, for the purpose of getting the numbers of the cars incorporated therein and bringing them back to the office (Rec. 106). The switch engine that killed him was moving north in the yards, without any cars being attached thereto, and was in a different part of the yards from where the incoming train was located (Record 52).

The record does not disclose any facts that would show that the switch engine, or the crew operating the same, was engaged in interstate commerce at the time deceased was killed; nor does the plaintiff in error so contend. It bases its claim that the Federal Employers' Liability Act applies, solely upon the proposition that the train to which deceased was going at the time he was killed had come from the State of Oklahoma into Texas. The testimony of T. A. Gribble shows that the plaintiff in error was incorporated under the laws of the State of Texas, with its principal office in the City of Fort Worth, and that it had no lines of railway north of Red River, the boundary of the state, but that all of its lines of railway were within the State of Texas. He thought it connected with the St. Louis & San Francisco Railway Company at Red River, but was not sure (Rec. 112). So that it will be seen that so far as the railroad lines of

plaintiff in error are concerned, it was altogether an intrastate road.

H. S. Emmerton, a brakeman on the train, testified that the train started from Sherman and went to Madill, Oklahoma, and came back; that it was usual for said train to pick up freight; that they usually brought cars from Oklahoma and usually picked up cars at Denison, Texas; but he did not testify where they picked up the cars that made the train on this occasion, whether in Oklahoma or in Texas (Record 100). Not a single witness testified where a single car in the train was picked up. The record does not even show that the same locomotive that left Sherman for Madill returned to Sherman. In other words, the evidence does not show that a single car, or even the locomotive was brought from Oklahoma into Texas. Merely to say that the train started at Madill, Oklahoma, and came to Sherman, Texas, does not show that it was an interstate train, because every car, as well as the locomotive, that left Madill, Oklahoma, might have been disposed of before reaching Sherman, and every car that was in the train, as well as the locomotive, might have been picked up within the State of Texas, on plaintiff in error's own line of railway, between Red River and Sherman.

Plaintiff in error introduced in evidence what it denominates as the report of the conductor. (See Rec. between pages 110 and 111.) From that report, which is unexplained by any testimony in the record, it is impossible to determine where the cars started or where

they were going. The "State of Oklahoma" or the "State of Texas" is not written on it at all. The court cannot take judicial knowledge of whether the stations therein named, purporting to represent the points from which, and to which, the cars were billed, were in the State of Texas, Oklahoma, or elsewhere, in the absence of proof. Our state courts take judicial knowledge of county site towns within the State of Texas, or such cities or towns as are incorporated in the general laws of the State of Texas, but do not take judicial notice of any other towns within the State of Texas, much less outside of the State of Texas.

Fields v. The State (Texas) 24 S. W. 407.

Hoffman v. The State, 12 Texas Cr. App. 406.

Galveston, etc., R. R. Co. v. Gage, 63 Tex. 568.

Yale Co. v. Ward, 30 Tex. 17.

So that we contend that there is nothing in the record to show that the train as it appeared in the Sherman yards on the night that deceased was killed, was other than an intrastate train. It would be going a long way to require the court to take judicial notice of stations on a railway other than that of plaintiff in error when the chief clerk, T. A. Gribble, himself, wasn't sure with what road the plaintiff in error connected at Red River, the border line of the State.

III.

But if it be admitted, for the sake of argument, that the train to which deceased was going when he was killed was an interstate train when it arrived in the yards at Sherman, yet deceased was not engaged in interstate commerce at the time he was killed, because at that time the train had reached its final destination and had been delivered to the switch crew in the yards, and the record does not disclose that there was anything further to be done with the cars that were incorporated in the train.

If the cars had reached their final destination when they were turned over to the switch crew in the switch yards, and there was nothing further to be done towards their delivery to any person or railroad, the switch crew, in handling them, would not be engaged in interstate commerce. In like manner, neither would deceased who took the numbers after the train was delivered to the switch crew.

Such is the doctrine laid down in *Rhodes v. Iowa*, 170 U. S. 412, and *McNeill v. So. Ry. Co.*, 202 U. S., 559, cited by plaintiff in error. There is no affirmative proof in the record as to what would become of those cars after they were delivered to the switch crew in the Sherman yards. There is nothing to show what kind of bills of lading they came into Sherman on; whether the end of the run was Sherman, or whether they were on a through bill-lading to some other point. If they had to be re-billed at Sherman to some other point in the State, they would constitute an intrastate shipment.

G. C. & S. F. R. Co. v. Texas, 204 U. S. 404 (51 L. ed. 541).

IV.

If, for the sake of argument, it be admitted that the train to which deceased was going at the time he was killed was an interstate train and the cars therein had come from the State of Oklahoma to Texas to be transferred to some other railway at Sherman for further transportation, yet the right of action of deceased would not come within the Federal Employers' Liability Act, for the reason that the character of service that he was performing at that time was not within the purview of the Act.

While the act is very broad and extends to any employee engaged in interstate commerce, yet such employee must have some potential duty in reference to carrying on interstate commerce. The Act has been construed to include any employee who has anything to do with operating a train or in delivering the freight from a car to the consignee, but we do not know of any case where it has been held that a clerk whose business it is to take the numbers of cars on trains and record them in a book while undertaking to perform his duties is killed by a switch engine not engaged in interstate commerce, has been held to be within the purview of the Federal Statute. He has nothing to do with the moving of trains or the handling of the freight or the forwarding of the cars. Can it be said that the act that he was performing was a potential one in the carrying on of interstate commerce? As said by Thornton in his second edition of the Federal Employers' Liability and Safety Appliance Acts, Section 38, page 76:

"In the case of clerks in the accounting department, although they be engaged in keeping the accounts of interstate shipments, it is difficult to see how they are engaged in interstate commerce as used in this statute; for their work is not of a hazardous character, such as it seems that Congress had in mind when it enacted this statute."

The case of *Pedersen v. Delaware, etc., R. R. Co.*, 197 Federal Reporter, page 537, decided by the Circuit Court of Appeals for the Third Circuit, was one in which a bridge builder was hurt while at work on a bridge that was used in hauling both state and interstate trains, by being struck by an intrastate train. The court held that the case did not come within the purview of the Employers' Liability Act.

The case of *Heimbach v. Lehigh Valley R. Co.*, 197 Fed. 579, opinion rendered by Circuit Judge J. B. McPherson, was one in which a car repairer was hurt while working on a car that had been transported from New Jersey to Pennsylvania. It belonged to another railroad, but had reached its destination, was awaiting orders for removal and was put on a side track for repairs. It was held that the car repairer was not engaged in interstate commerce so as to come under the Federal Employers' Liability Act.

The court will remember that according to the findings of fact of the Court of Civil Appeals, as well as by the facts disclosed by the record, the train had already been delivered to the switch crew at the time deceased went to take a list of the numbers of the cars; and that

there was no evidence as to the destination of the cars. Could it then be said that deceased's act was a potential one in the carrying on of interstate commerce so as to bring his death within the purview of the Federal statute?

V.

If the court should hold that the facts show that deceased was engaged in interstate commerce at the time he was killed, so as to come within the purview of the Federal Employers' Liability Act, the plaintiff in error not having objected in limine to the suit being brought by the beneficiaries instead of by the personal representative, cannot now complain.

We call the court's attention to Proposition 3, pages 42-46 inclusive, of the brief of defendants in error on the motion to dismiss or affirm, where this proposition is discussed.

In addition to what is set out there, we desire to say, further, that we have found no case decided by this court where you have held that the question of proper parties did not have to be raised by proper pleadings in the lower court. You do not so decide in *American R. Co. v. Birch*, 224 U. S. 557, cited by plaintiff in error. In that case, the point that the personal representative, and not the beneficiaries, was the proper party plaintiff, was raised both by demurrer and answer and overruled; and all that you decided was that when the question was raised *in limine* the personal representative should be made party plaintiff.

You do not so hold in *M., K. & T. R. Co. v. Wulf*, 226 U. S. 570. In that case, the railway company raised the issue by proper pleading in the lower court, and the personal representative was made party plaintiff. The personal representative was made party plaintiff more than two years after the right of action accrued, and the only issue in that case was whether or not the making of the personal representative party plaintiff was the bringing of a new suit so as to let limitation bar the action, or whether it took effect from the date of the filing of the original petition. On the contrary in *Baltimore & Ohio v. Stewart* (168 U. S. 445, 42 L. ed. 537) you held as follows:

"For purpose of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party. *Browne v. Strobe*, 9 U. S. 5 Cranch, 303 (3:108); *McNutt v. Bland*, 43 U. S. 2 How. 9 (11:159); *State of Maryland, for use of Markley v. Baldwin*, 112 U. S. 490 (28:822). See also *Gaither v. Farmers' & Mechanics' Bank of Georgetown*, 26 U. S. 1 Pet. 37, 42 (7:43, 45), in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcorran, plaintiff, and Gaither, the defendant, upon which the court said: 'This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que use* is regarded as the real party to the suit.' It is true those were actions on contract, and this is an action for a tort, but still in such an action it is evident that the real party in interest is not the nominal plaintiff but the party

for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party."

When the plaintiff comes into this court not complaining that a proper judgment has not been rendered herein, not contending that it has been deprived of any defense under the Federal Statute that it did not obtain on the trial of the case, but merely claiming that the parties who were entitled to the recovery should not have recovered the same in their own names but should have obtained the same through a personal representative; and when plaintiff in error did not care enough about the question of parties plaintiff to raise it by proper pleadings *in limine*, it should not be allowed, at this late date, to defeat a meritorious cause of action on a mere technicality. It should not be allowed to "bushwhack," but should be forced to fight in the open.

VI.

The pleading and practice that governed the trial of this case was that of the State of Texas, and by virtue of the same plaintiff in error cannot complain of the want of proper parties, because it did not plead the same in limine.

We have also briefed this matter very fully in our brief on motion to dismiss or affirm, under proposition 4, pages 46-65, inclusive. We do not know that we can add anything to what is there said, and we refer the court to the same.

However, in this connection we will review some Texas authorities cited by the plaintiff in error on this point in its brief filed since the filing of our brief on the motion to dismiss or affirm.

On page 77 of the brief of plaintiff in error, it cites the case of *Gulf Colorado & Santa Fe R. Co. v. Lester*, 149 S. W., 841, decided by the Court of Civil Appeals of the State of Texas for the third district. That case is not in point, because the issue that the personal representative should prosecute the suit instead of the beneficiaries was raised by the defendant railway company, both by special exception and plea in bar, in the trial court. That case merely follows the doctrine laid down by this court in the *Birch* case (224 U. S. 557), but does not touch the issue involved in the case at bar.

On pages 80-83, inclusive, of the brief of plaintiff in error, it reviews the case of *Kansas City M. & O. R. Co. v. Pope*, decided by the Court of Civil Appeals for the Second District of Texas. The original opinion is quoted in 152 S. W. 185, and the motion for rehearing in 153 S. W. 163. We challenge the statement of counsel for plaintiff in error in saying that the pleadings in the trial court did not disclose whether the cause of action arose under the federal or state statute. There is nothing, either in the original opinion or in the opinion overruling the motion for rehearing that would authorize that statement. They do not show what the defendant railway company's pleadings were. They only show that the pleadings of the plaintiff disclosed a cause of action under the state act and that the proof disclosed a

cause of action under the Federal Act. They do not disclose whether the defendant raised any objection to parties plaintiff, either by exception or plea in bar. But if that case should go as far as plaintiff in error claims that it does, it would not be authority in the State of Texas, because its opinions are subject to review by the Texas Supreme Court. Under our practice, where the Court of Civil Appeals reverses and remands a case to the trial court, writ of error does not lie to the Texas Supreme Court, except in certain instances that do not apply to this case. As this case was reversed and remanded to the trial court, this opinion has never been approved by the Supreme Court. Further, if it should go as far as counsel for plaintiff in error claims it does, it would be in direct conflict with the opinion of the Texas Supreme Court in the case at bar; because if plaintiff in error presented the case to the Texas Supreme Court by writ of error, raising the questions involved, that court has already held in the case at bar that the Court of Civil Appeals has correctly decided the case, and that is authority in Texas.

In passing, it might be well to again remind the court that there is no issue in the case at bar except a question of pleading in the state court, which this court has time and again said that it will not review.

T. & N. O. Ry. Co. v. Miller, 221 U. S. 408 (55 L. Ed., 795).

Brinkmeyer v. M. P. Ry. Co., Advance Sheets of the U. S. Supreme Court, Oct. Term, 1911, No. 11, page 413. Reviewed on page 46 of our brief on motion to dismiss or affirm.

VII.

If the court finds error on the part of the State Courts, it can modify the judgment of the State Courts and enter such judgment as, in its discretion, should have been entered in the State Courts.

If the court should conclude

(a) That the facts show that the cause of action is governed by the Federal Employers' Liability Act.

(b) That said facts are properly in the record in this cause; and,

(c) That the said Federal Employers' Liability Act should be applied in this cause as to the proper beneficiaries, then it should enter such judgment as should have been entered by the state court.

The court will observe that if the state statute applies, all of the defendants in error are entitled to recover; if the Federal Employers' Liability Act applies, then only the wife, Maude Seale, is entitled to recover, and F. H. and J. E. Seale, the father and mother of deceased, respectively, are not entitled to recover anything.

Under the authority of *Baltimore & Ohio v. Stewart* (168 U. S. 445, 42 L. Ed. 537), that this court looks to the real and not to the nominal parties, the judgment as to Maude Seale should be affirmed, even though the court should find that, notwithstanding our Texas practice, the plaintiff in error properly raised the question by a special charge and not by pleading. In that event, the court could reverse and render as to the amounts awarded to the said F. H. and J. E. Seale, respectively.

Section 709 of the United States Revised Statutes, authorizing this court to review decisions of the state courts, has the following clause:

"The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may in their discretion, award execution or remand the same to the court from which it was removed by the writ."

See also:

Stanley v. Schwalby, 162 U. S., 255.

Fairfax v. Hunter, 7 Cranch (U. S.,) 603.

Martin v. Hunter, 1 Wheat. (U. S.), 304.

As the plaintiff in error does not claim that any error was committed further than the want of proper parties plaintiff, and as the facts show that Maude Seale would be the sole beneficiary under the terms of the Federal Employers' Liability Act, and the jury have awarded her damages, there is no reason why the case should be again submitted to the jury by a personal representative for her benefit. Especially as plaintiff in error made no objection to parties plaintiff *in limine*, but contented itself with asking a charge in bar on the merits. It may be also said that a grave question of limitation might arise upon the personal representative prosecuting this suit at this late date.

In this connection, we call the court's attention to the fact that the rule for the admeasurement of damages in death cases under the Statute of Texas is the same as this court applies to deaths arising under the Federal

Employers' Liability Act, as set forth by Mr. Justice Lurton in *Michigan Central R. Co. v. Vreeland* (227 U. S., 59) and *American, Etc. Co. of Porto Rico v. Dedricksen* (227 U. S., 296); that is to say, the damage is restricted to the pecuniary benefits that the beneficiary might reasonably have expected to have received from the deceased.

M. P. Ry. v. Henry, 75 Tex., 220.

McGown v. I. & G. N. Ry. Co., 85 Tex., 293.

In Conclusion.

We contend that this case should be dismissed for want of jurisdiction, as set forth in our brief on motion to dismiss or affirm; or in the alternative, that it should be affirmed.

1. Because the decision of the state court was manifestly right.

2. Because the pleadings did not present the issue of the Federal Employers' Liability Act under any rules of pleading.

3. Because the pleadings did not raise the issue of proper parties under the Federal Employers' Liability Act by the rules of practice and decisions of the Texas courts, which obtained in the trial of this cause.

4. That the cause was decided in the state court upon issues independent of the construction of the Federal Employers' Liability Act, to-wit, under the Texas statute.

5. That there were no pleadings to authorize the introduction of facts that would show that the Federal Employers' Liability Act obtained; and if said facts are properly before the court, they do not show that the deceased was engaged in interstate commerce at the time he was killed.

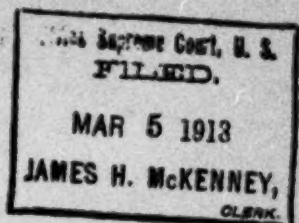
6. That if the court should hold that the pleadings authorized the introduction of facts as to the deceased being engaged in interstate commerce at the time he was killed, and that said facts show that he was so engaged, plaintiff in error not having objected to parties plaintiff *in limine* cannot complain or,

7. That in the event the court shall hold that the Federal Employers' Liability Act was properly invoked in the trial court and the facts show that the cause arose thereunder, and should further find that defendants in error, F. H. and J. E. Seale, are not entitled to recover anything in said cause, but that Maude Seale is, the court should modify and enter such judgment as should have been rendered by the state court.

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F. H. Seale and J. E. Seale,
Defendants in Error.*



NUMBER 857.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

**ST. LOUIS, SAN FRANCISCO AND TEXAS RAIL-
WAY COMPANY, PLAINTIFF IN ERROR,**

VS.

**MAUDE SEALE, F. H. SEALE AND J. E. SEALE,
DEFENDANTS IN ERROR.**

**BRIEF FOR DEFENDANTS IN ERROR ON MO-
TION TO DISMISS OR AFFIRM.**

**JUDSON H. WOOD,
JAMES P. HAVEN,**
*Attorneys for Maude Seale, F. H.
Seale and J. E. Seale, De-
fendants in Error.*



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VS.

MAUDE SEALE, F. H. SEALE AND J. E. SEALE,
DEFENDANTS IN ERROR.

PRELIMINARY STATEMENT.

This suit was brought in the District Court of Grayson County, Texas, for the 15th Judicial District, by defendants in error to recover of plaintiff in error damages by reason of the death of Memory T. Seale, who was the husband of Maude Seale and the son of F. H. and J. E. Seale, deceased, leaving no children. The suit was brought under the Texas Statute, allowing damages by reason of death caused by negligence. The facts showed that the deceased was killed while performing his duties

as seal clerk for the plaintiff in error in its local yards in the City of Sherman, Grayson County, Texas, by being run over by a switch engine while on his way from the yard office to a freight train to which he was going for the purpose of getting the numbers on the cars (Rec. 1-5). Plaintiff in error filed a general demurrer and special demurrers. The special demurrers were, in substance, that the original petition failed to state whether the deceased was engaged in interstate commerce at the time he was killed, and whether or not the plaintiff in error was likewise engaged in interstate commerce at said time, and that the petition did not show whether the right to recover was governed by the Federal Employers' Liability Act. Its answer to the merits consisted of a general denial and special pleas of contributory negligence and assumed risk (Rec. 6-7).

Said special demurrers were by the court overruled, to which plaintiff in error reserved its exception. The trial court permitted the plaintiff in error to introduce proof to show that the train to which deceased was presumed to be going for the purpose of getting the names of the cars therein incorporated at the time he was killed, had come into Texas from Oklahoma, and that said cars were destined to various parts of the State of Texas.

After the court had delivered its charge to the jury, plaintiff in error requested a special charge which was refused by the court, to find peremptorily for the plaintiff in error, because defendants in error were not shown to be the "legal" representatives of the deceased and were not entitled to prosecute the suit (Rec. 17).

On the overruling of these special demurrers and the refusal to give said special charge, plaintiff in error bases its Federal question, on which it relies to give this court jurisdiction.

The jury found a verdict for defendants in error in the sum of \$11,000.00, and apportioned the same as follows: To Maude Seale, the widow of deceased, \$9,000.00, and to F. H. and J. E. Seale, the father and mother of the deceased, respectively, \$1,000.00 each (Rec. 20).

A motion for a new trial was made in the lower court and overruled, and an appeal was perfected to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, where the case was affirmed (Rec. 118-119). A motion for rehearing was filed in the Court of Civil Appeals which was by that court overruled (Rec. 129-130).

Plaintiff in error was entitled under the Statutes of Texas, and rules governing its courts, to apply to the Supreme Court of Texas for a writ of error to the Court of Civil Appeals within thirty days after the overruling of the motion for a rehearing in the latter court, for the purpose of having the Supreme Court to review said cause. Under the statutes and the rules for governing the Texas courts, said petition for writ of error must set out the specific grounds of error relied on for obtaining said writ of error. No petition for writ of error to the Supreme Court of Texas appears in the record, therefore it is not disclosed what specific errors were set out therein on which plaintiff in error relied to obtain a writ of error from the Texas Supreme Court to the Court of Civil Appeals.

However, the record discloses a judgment of the Supreme Court refusing the writ of error (Rec. 130).

Under the Texas Statutes, and rules governing the Texas courts, plaintiff in error had fifteen days after the denial of the writ of error by the Supreme Court to file a motion for a rehearing in that court on the refusal to grant said writ. The record does not disclose whether said motion for a rehearing was filed in the Texas Supreme Court or not.

Under the Texas Statutes the judgment of the Supreme Court denying a writ of error becomes final fifteen days after the rendition thereof, unless a motion for rehearing is filed within said time. If a motion for rehearing is filed within said fifteen days, then the judgment of the Supreme Court denying the writ of error becomes final after denying the motion for a rehearing. The clerk of the Supreme Court of Texas cannot certify a judgment of said court denying a writ of error to the Court of Civil Appeals for observance until fifteen days after the denying of the writ of error, or until after the denying the motion for a rehearing.

The record discloses that the Supreme Court entered a judgment denying a writ of error in this case on October 16th, 1912; that said judgment was certified to the Court of Civil Appeals by the clerk of the Supreme Court on Nov. 6, 1912, and filed by the clerk of the Court of Civil Appeals on Nov. 7, 1912 (Rec. 130). Yet, on Oct. 25, 1912, a writ of error was granted by Mr. Justice Lamar to the Texas Court of Civil Appeals in this case (Rec. 130), nine days after the rendition of the judg-

ment by the Supreme Court denying the writ of error, and six days before the judgment of the Supreme Court became final, and likewise, six days before plaintiff in error was precluded from filing in the Supreme Court of Texas its motion for a rehearing of the denial by said court of the writ of error. The record discloses that the cause of action of the defendants in error was brought under the Texas death statute; there being no allegations in their pleadings that would bring the action under the provisions of the Federal Employers' Liability Act. Neither did the plaintiff in error, by its pleadings, undertake to bring the action within the scope of the Federal Employers' Liability Act. The Court of Civil Appeals held that the trial court properly overruled the special demurrers above referred to, because the petition of the defendants in error disclosed the fact that the right of action was brought under the Texas Statutes, and further held that no evidence that the train to which deceased was going was engaged in interstate commerce could be considered, on account of the absence of pleading. Neither the district court in which the case was originally tried, nor the Court of Civil Appeals passed on or construed the Federal Employers' liability Act, and the Supreme Court of Texas approved the same (if it was presented in the petition), by refusing the writ of error.

The record discloses that plaintiff in error did not undertake, by either pleading or by special instructions to the jury, to have its rights determined under the provisions of the Federal Employers' Liability Act instead of under the provisions of the Texas Statutes. It may be

said that its sole contention as to the Federal question involved is that the right of action accrued under the Federal Employers' Liability Act and that the suit was improperly brought by the beneficiaries named (who were the proper parties under the Texas Statute), but should have been brought by the personal representative as provided by the Federal Employers' Liability Act.

It filed no pleadings, either by way of exception, or by plea in abatement or in bar, objecting to the parties plaintiff. It relied solely upon its special exception, in substance, that the petition did not disclose whether the right of action accrued under the Federal Employers' Liability Act, and the special instruction asking for a peremptory verdict because the defendants in error were not the "legal representatives of the deceased.

The Texas courts held that under the pleadings and practice governing the same, that neither the special exception nor the requested special charge was the proper way to object to parties plaintiff. Therefore under the record, the suit was filed and determined under the Texas Statute.

Under the head of "complete statement," herewith following, we set out, for the convenience of the court, the entire record necessary for passing on the issues involved.

COMPLETE STATEMENT.

Second Amended Original Petition of Defendants in Error Upon Which This Suit Was Tried.

"Now comes Maude Seale, F. H. Seale and J. E. Seale, plaintiffs in the above styled and numbered cause, and after having obtained leave of the court, files this as their second amended original petition, amending their first amended original petition, filed herein on Nov. 9, 1909, and for such amendment say:

Complaining of the defendant, the St. Louis, San Francisco & Texas Railway Company, a corporation duly incorporated and organized under the laws of the State of Texas, represent that defendant has already duly filed its answer herein.

That defendant corporation did, at the time of the happening of the matters and things hereinafter complained of, and does now, maintain railway yards, round houses, shops and terminals in what is known as North Sherman, Grayson County, Texas, where trains, locomotives and cars were and are switched and propelled for the purpose of taking to pieces and making up trains; said place also being a division point and is maintained and used for the purpose of terminals for trains arriving there and for trains that leave said point.

That heretofore, to-wit: On the night of January 16, 1909, Memory T. Seale, was in the employment of the defendant in the capacity of a clerk, known and designated as seal or yard clerk, and performed his duties at night

at said above described railway yards and terminals. That on said day about 7:45 o'clock p. m., he was performing his said duties in said railway yards when defendant recklessly, carelessly and negligently propelled and ran a locomotive against and over deceased, thereby cruelly crushing, wounding and mutilating him to such an extent as to cause his death, within a few minutes after he received said injuries. That said Memory T. Seale, hereinafter known as 'deceased,' was struck and killed in the following manner, to-wit:

While performing his duties and acting in the scope of his authority, he was on his way from a compartment or building known as a 'box-car;' which was, among other things, used as a telegraph station and office, situated on or near the east side of said railway yards, with dispatches, messages and papers to be by him delivered to a clerk in an office building maintained on or near the west side of said yards, when he heard a freight train coming in from the north, bound for said yards and terminals, and was told by the night yard master of the defendant, who was then and there the superior of deceased, to hurry up with his errand and return and check up the incoming train, as it was desired to make up a train at once to go out of said terminals to the south, and certain cars would have to be incorporated in said train which were then in the train coming in from the north.

That it was then and there the duty of deceased to obey said yard master, and it was then and there his duty to check up said incoming train by obtaining the name, number, and designation of the cars of said incoming

train, and report the same to a night yard clerk that had his place of business in the office building in the west side of said yards. That after receiving said instructions from the yard master, deceased continued on his way to said office building in the west of said yards, and delivered his dispatches, messages and papers to the night yard clerk therein, and picked up his lantern and started in a northeasterly direction for the purpose of meeting said incoming train, and after he had gotten a short distance from said office, the defendant's locomotive engaged in switching and propelling cars in said yards, backing up from the south, came up behind deceased, and diagonally behind him, and without notice or warning, struck, ran over and cruelly killed him as aforesaid.

That defendant was guilty of gross carelessness and negligence, causing said deceased to be struck and killed as aforesaid, as follows, to-wit: The railway track upon which said locomotive was being backed was just east of the office building heretofore described, situated in the west part of the yards, and was entirely too close to the same; that the door to the same opened to the north at and near the west side of said building, so that locomotives and engines coming up said track from the south were obscured by said office building from the view of deceased until he was immediately in front thereof; there was no light on the tender of said locomotive as it was backed up said track on said occasion. Said locomotive was running at a very dangerous and rapid rate of speed, to-wit, about 25 miles per hour; that said locomotive

had been down south on what was known as the 'Y,' to leave a car, and was backing north for the purpose of coming on a switch and heading in to the east part of said yards. That when said locomotive was ready to start north, after leaving said car, it blew no whistle and did not ring its bell before starting, nor did it blow its whistle on said locomotive, or ring its bell, from the time it started from the south until it had run over and killed the deceased. That the rules of the defendant required that said whistle be blown before said locomotive be started to backing, and that the bell thereon should be kept ringing during the time it was in motion; that it was the custom of defendant's employes operating switch engines to blow the whistle and keep the bell ringing on locomotives when starting and during its movement; that it was the custom of the defendant's employes propelling its switch engines to blow its said whistle and ring its said bell when coming on or coming off of said 'Y'; that it was then and there the duty of the defendant's employes operating said switch engine to blow its said whistle and ring its said bell when moving its said switch engine as aforesaid, independent of any custom or rules, for the proper protection of persons who might be rightfully in, and using, said railway yards; that there was no person on the back end of said tender of said engine, being the front as the engine was backing, to keep a lookout for persons who might come in the way of said tender of said locomotive; that the rules and custom of the defendant company required some person should always be on the rear of the tender of a switch engine when backing, being

the front end as it is backing, for the purpose of keeping a lookout; that the custom of the defendant required that persons should be on the rear of said tender as it backed for the purpose of keeping a lookout; that independent of said rules and customs it was necessary and proper to have some person on the rear of said tender as said locomotive was backing, for the purpose of keeping a lookout for persons or other obstructions that might be in and upon said tracks in said railway yards at said time. That if there had been some person on the rear of said locomotive tender as it backed up on this occasion, he could have seen deceased in time to have prevented his injuries and death; that the engineer and fireman then and there in charge of, operating and propelling said switch engine, failed and refused to keep a lookout for persons on said track; that if they had kept said lookout they could have seen deceased in time to have prevented his being struck and killed, as aforesaid; that said engineer and fireman did then and there see the deceased and his peril, and that the deceased was unaware of his peril, in time to have prevented striking him, but failed and refused to warn deceased, or stop said engine or slow up the same and used no other precaution for his safety; that the engineer, fireman, switchmen and employes of defendant then and there working on and in connection with said locomotive, then and there saw deceased, and saw that he was in peril, and that he was unaware of his peril, in time to have prevented striking him with the use of appliances at their command, but failed and refused to stop said locomotive, or undertake to stop the same; that they

saw said deceased, and saw his peril in time to have warned him of his danger and prevented his being struck and killed, but that they then and there failed to warn him, and failed to stop or slow up said locomotive, or use any other precaution for deceased's safety. That at the time deceased was run over and struck as aforesaid, he was traveling along a well defined and marked road, or pathway, that crosses the track he was on, that lead from said office in the west yards, under and between the trestle and incline, to the coal chutes, to the east yards and the telegraph office thereof; that said pathway and road had been in use by employes, and the public, with the knowledge and acquiescence of said defendant for a long period of time, and that it was well known to defendant that said pathway, or road, was used by its employes, and other persons not engaged in switching trains, who were rightfully in said yards at all times of the day and night, for a long time prior to the time deceased was killed, or it could have been known by the use of ordinary care. Yet defendant's employes then and there in charge of and operating said switch engine failed and refused to give notice of its approach to said road or pathway, by blowing the whistle or ringing the bell, or in any other manner, and then and there failed and refused to keep a lookout for persons that might be using the same; that if said signals had been given, or if the proper lookout had been kept, deceased could have been warned of the approach of said locomotive, and the same could have been stopped in time to have prevented deceased's injuries and death as aforesaid. That said deceased was a young

man, and a raw hand at the work that he was engaged in at said time, having entered his employment for the first time at 7 o'clock on the night he was killed, and did not know the danger incident to the performance of his duties under the circumstances hereinbefore set forth, and was not instructed as to the same by the defendant. That all of said acts of negligence, as hereinbefore set forth, were well known to the defendant prior to the time deceased was killed, or could have been known by the use of ordinary care, in time to have prevented the same, and the consequent death of the deceased; but the same were unknown to deceased. That by reason of all of said acts of negligence, jointly and severally, deceased was struck and cruelly killed as aforesaid.

Plaintiff, Maude Seale, is the surviving wife of deceased; and plaintiffs F. H. Seale and J. E. Seale are the father and mother of said deceased, respectively.

That deceased left no children surviving him and plaintiffs herein named have the sole right to sue for damages by reason of the death of deceased.

That at the time deceased was killed he was a young man, 25 years of age, strong, healthy, robust, vigorous, energetic, and bid fair to live to an old age, to-wit, the age of 80 years, but for his untimely death as aforesaid.

At the time and prior to the death of deceased, he was yard and night clerk as aforesaid, and a laborer and earned large sums per month as such, to-wit: the sum of One Hundred (\$100.00) Dollars per month; that his time and services were reasonably worth said sum, and would have continued to be worth said sum, and a larger

sum, by reason of promotion in said occupation; but by reason of his untimely death, his time and services have been wholly lost to plaintiffs. Decedent contributed all of his earnings to plaintiffs, and would have continued to have contributed the same to them during the remainder of his and their lives, except for his untimely death as aforesaid. That plaintiff, Maude Seale, is 24 years of age, and plaintiffs, F. H. and J. E. Seale, are 66 years of age respectively, and all of said plaintiffs have a reasonable prospect of living to the age of 80 years each.

That by reason of the premises, plaintiffs have been damaged in actual damages in the sum of Thirty-five Thousand (\$35,000.00)Dollars.

Wherefore, plaintiffs sue, and defendant having already answered herein, they pray that upon final trial they have judgment for their damages and costs of suit; and that said damages be apportioned among them as required by law." (Rec. 1-5)

Answer of Plaintiff in Error Upon Which This Case Was Tried.

"Now comes the defendant, St. Louis, San Francisco & Texas Railway Company, and says:

First. Defendant demurs generally to plaintiff's petition because the facts therein alleged show no cause of action.

Second. Defendant demurs specially to plaintiff's petition because, first, it is too general, vague and indefinite, both (a) in stating the acts of negligence charged against the defendant and (b) the injuries re-

ceived by plaintiff. Second, because said petition does not show whether or not at the time said Seale was injured he was engaged in the handling of interstate commerce; third, said petition does not show whether or not defendant, at the time it committed the acts complained of was engaged with respect thereto in the handling of interstate commerce; fourth, said petition does not show whether or not plaintiff's right to recover and defendant's liability and defenses are governed by an Act of Congress passed April 22nd, 1908, entitled 'An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases.'

Third. Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof thereof.

Fourth. Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by plaintiff's own negligence and want of ordinary care and by that of deceased M. T. Seale and his fellow servants. The said injuries, if any were received, resulted from one of the risks assumed by plaintiff and by deceased M. T. Seale. That of the said defects and causes which produced the injuries complained of, if any were produced, the plaintiff and said deceased M. T. Seale had full notice, or by the exercise of ordinary care on his part, would have had full notice in ample time to have avoided the same.

The deceased was guilty of contributory negligence in that he went upon said track immediately in front of

said engine; he went upon said track without exercising any precaution for his own safety; he did not stop, look or listen before entering upon said track; he went upon said track in a run or trot; he was guilty of negligence in going upon said track and in undertaking to cross same at the time when, the place where and the manner in which he did.

Wherefore defendant prays to be discharged with its costs" (Rec. 6-7).

13th. Special Charge Requested by Plaintiff in Error and Refused by the Court.

"Defendant requests the court to instruct the jury as follows: 13. The plaintiffs in this case are not shown to be the legal representatives of the deceased M. T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant" (Rec. 17).

Judgment and Verdict in the District Court.

"On this day the above numbered and styled cause coming regularly on for trial, came the plaintiffs in person and by their attorneys and the defendant appeared by its attorneys and all parties announced ready; then came a jury of twelve good and lawful men, viz., J. W. Jordan and eleven others, who, having been duly selected, tried, empaneled and sworn, and having heard the pleadings, the evidence, the argument of counsel and charge of the court, retired to consider of their verdict, and afterwards returned into open court, in due form of law,

the following verdict, which was received by the court, and is here now entered upon the Minutes, to-wit: 'We, the jury, find for plaintiffs and assess their damages at \$11,000.00, and we apportion said sums as follows: To Maude Seale \$9,000.00; to F. H. Seale \$1,000.00; and to J. E. Seale \$1,000.00. J. W. Jordan, Foreman.'

It is therefore ordered, adjudged and decreed by the court that the plaintiffs, Maude Seale, F. H. Seale and J. E. Seale, do have and recover of and from the defendant, St. Louis, San Francisco & Texas Railway Company, a corporation, said sum of Eleven Thousand (\$11,000.00) Dollars, apportioned as follows: To Maude Seale Nine Thousand (\$9,000.00) Dollars; to F. H. Seale One Thousand (\$1,000.00) Dollars; to J. E. Seale One Thousand (\$1,000.00) Dollars, with interest thereon from this date at the rate of 6% per annum, together with all costs of suit, for which let execution issue" (Rec. 20).

Opinion of the Court of Civil Appeals.

"Appellees sued the appellant to recover damages for the negligent killing of Memory T. Seale, who was the son of F. H. and J. E. Seale, and the husband of Maude Seale.

A trial was had and a verdict and judgment were rendered for plaintiffs, and defendant appeals.

Appellant complains of the action of the court in overruling its second and third special exceptions to plaintiffs' petition, on the ground that said petition did not show that at the time of the accident whether or

not defendant was engaged in interstate commerce and whether or not deceased was engaged in handling said commerce.

The proposition submitted by appellant under said assignment is: 'If defendant was engaging in the transportation of interstate commerce, and deceased was in its employ in connection therewith at the time he was injured, the cause of action and defendant's liability would be governed by and founded upon Act of Congress passed April 22, 1908, entitle "An Act Relating to the Liability of Common Carriers by Railroads to Their Employes in Certain Cases," while if defendant was not so engaged the rights of the parties would be governed by and founded upon the death and assumption of risk statutes and other laws of the State of Texas. These laws being different the defendant, by special exception, had the right to require plaintiffs to allege in their petition such facts as would enable it to determine which of these laws applied.'

We do not think the court erred in overruling the exceptions as stated.

The action was brought under the state law and the petition stated a good cause of action, and was not subject to the exceptions presented. This precise question was passed upon by this court in the case of *Railway v. Neaves*, 127 S. W. 1090, and a writ of error was denied by our Supreme Court, the holding in said case being contrary to appellant's contention.

The evidence shows that at the time Memory T. Seale was killed he was in the employ of appellant in the

capacity of yard clerk in the yards in North Sherman, Grayson County, Texas. While in the discharge of his duties as such clerk he was struck and killed by appellant's servants in the negligent operation of an engine.

The court did not err in charging the jury that deceased had just gone to work as yard clerk for appellant. The evidence shows that he was killed at night when he had been at work for the first time in that capacity about forty minutes.

We think the evidence such that the issue of discovered peril was raised and the court did not err in charging on that issue.

The trial court refused a special charge requested by appellant, of which it complains, said charge reading: 'The plaintiffs in this case are not shown to be the legal representatives of the deceased, M. T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant.'

The proposition submitted thereunder is: 'The deceased, at the time of receiving the injuries which caused his death, was engaged in interstate commerce, and the cause of action, if any, arising on account of his death, is based upon, and controlled by, the Act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroads to Their Employees in Certain Cases," commonly called the "Federal Employers' Liability Act," and not the Texas death statute, which was superseded by the said Act of Congress

as to causes of action coming within its terms, and since the plaintiffs have not brought themselves within the provisions of said Act there can be no recovery on their part in this suit.'

We are of the opinion that the court did not err in refusing said charge. There was no plea in abatement for the want of capacity in plaintiffs to maintain this suit, which was necessary under our statutes to take advantage of such defects, if any, and which plea should be filed in due order of pleading. Rev. Stats. 1268-1269; *Blum v. Strong*, 71 Tex. 328.

The statutes of Texas authorize a recovery by plaintiffs as set forth in their petition, and there was no pleading by defendant setting forth as a defense to said cause the Act of Congress, approved April 22, 1908, entitled 'An Act Relating to the Liability of Common Carriers by Railroads to Their Employees in Certain Cases,' commonly called the 'Federal Employers' Liability Act,' which Act, whatever effect it may have upon the statutes, cannot be invoked to defeat plaintiffs' right of recovery in this suit, as it was in no way pleaded by defendant. The plaintiffs are the real beneficiaries. The fact that the suit was not brought in the name of some administrator or executor of the estate of Memory T. Seale, deceased, should not prevent a recovery.

All assignments not mentioned herein have been considered, but none present reversible error.

The evidence supports the verdict and the judgment is affirmed.

Rainey, Chief Justice."

(Record 118-119).

Judgment of the Court of Civil Appeals.

"Opinion of the Court delivered by Mr. Rainey, Chief Justice:

This cause came on to be heard on the transcript of the record and the same being inspected, because it is in the opinion of the court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, Maude Seale, F. H. Seale and J. E. Seale, do have and recover of appellant, St. Louis, San Francisco and Texas Railway Company and J. G. Waples and Wm. G. Newby, its sureties upon appeal bond, the amount adjudged below and all costs in this behalf expended and this decision is certified below for observance."

Opinion of Court of Civil Appeals on Motion For Re-hearing.

"Appellant insists that the facts of this case bring it within the Act of Congress approved April 22nd, 1908, known as the 'Federal Employers' Liability Act,' and the same is controlled by its provisions. As said by Mr. Chief Justice Brown, in the case of *M. K. & T. Ry. Co. of Texas v. Blalack*, recently decided, 'this court has never questioned that the Constitution of the United States and the laws enacted by Congress in the exercise of powers derived from that Constitution are superior to the laws of this on the same subjects.' We are of the opinion, however, that the facts in this case do not bring it within the purview of the Federal Statute. The de-

ceased was run over and killed by a switch engine operated in the yards of appellant in Sherman, Texas. He was working under T. A. Gribble, who was chief clerk out at those yards and in charge of the same. Deceased's work was done in connection with the clerks in the yards, and with the switch crew. After a train was brought in, it was delivered to the switch crew. The first act was to obtain the numbers of the cars and make a record of them in the office, then the switch crew began the work of tearing the train up and making new trains. He got the numbers and initials of each car and that came in and went out of the yards. When a train comes in the yard he goes out and gets the number and initials of each car and gets the seals that are on the car doors. Whatever impression is on the seal he keeps in his book that he carries. He gets the number of the train. He gets the cars that are made out for this train according to the conductor's switch list. He puts the cards on the cars in order that the switchman may switch the train properly. After he does that he goes in the office and checks his list, checks his book in the office with the train clerk and also enters his seals. It is done in order to keep records. A train was coming in from Oklahoma at that time. It was a freight train. The north Sherman yards were the terminal for that train. That is, that was the end of the run of that train. If any trains went south they were made up in the yards, new trains, and sent south, or other trains made up and sent north. The evidence does not show that any of the cars in the train coming in were destined

for other points. Such being the evidence this case is not controlled by said Federal Act.

The motion for rehearing is overruled.

Rainey, Chief Justice" (Rec. 129-130).

Order of Supreme Court Refusing Writ of Error.

"This day came on to be heard the application of St. Louis S. F. & T. Ry. Co. for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been fully considered, it is ordered that said application be refused. That the applicant St. Louis, San Francisco & Texas Railway Company and its sureties, J. G. Waples and W. G. Newby, pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said court, this the 6th day of November, A. D. 1912. F. T. Connerly, Clerk. By J. S. Myrick, Deputy.

Filed in Court of Civil Appeals Nov. 7, 1912, Geo. W. Blair, Clerk 5th District" (Rec. 130).

Petition for Writ of Error to the Supreme Court of the United States.

"To the Supreme Court of the United States:

Your petitioner, the St. Louis, San Francisco & Texas Railway Company, a corporation incorporated un-

der the laws of the State of Texas, having its principal place of business in the City of Fort Worth, County of Tarrant, and State of Texas, plaintiff in error in the above entitled cause, respectfully shows to this court that on May 12, 1910, a judgment was rendered in the District Court of Grayson County, Texas, against it for the sum of Eleven Thousand (\$11,000.00) Dollars in favor of Maude Seal, F. H. Seale and J. E. Seale, the same being apportioned as follows: Nine Thousand (\$9,000.00) Dollars in favor of Maude Seale, One Thousand (\$1,000.00) Dollars in favor of F. H. Seale and One Thousand (\$1,000.00) Dollars in favor of J. E. Seale, defendants in error.

Pursuant to the civil statutes of the State of Texas said cause was appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, where, on June 15, 1912, said judgment was affirmed; that afterwards pursuant to the provisions of the civil statutes of Texas a motion for rehearing in said cause was presented to the said Court of Civil Appeals and was by it on June 22, 1912, overruled; that afterwards, and pursuant to the civil statutes of the State of Texas, it filed in the Court of Civil Appeals and caused to be presented to the Supreme Court of Texas, a petition for writ of error to review said cause, which petition was by said Supreme Court refused, on October 16, 1912, and the said Court of Civil Appeals for the Fifth Supreme Judicial District of Texas is the highest court of said State in which a decision of this case could be had.

In the said action, rights, privileges and immunities were claimed by your petitioner under the constitution and statutes of the United States and under authority exercised under the United States and the decision of the said Court of Civil Appeals was against the rights, privileges and immunities specially set up and claimed under said constitution, statutes and authority, all of which will more fully appear in detail from the assignments of error filed herein.

Wherefore, said St. Louis, San Francisco & Texas Railway Company prays that a writ of error may issue to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas for the correcting of the errors complained of, and duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court. Andrews, Ball & Streetman, Head, Smith, Hare & Head, attorneys for Plaintiff in Error, St. Louis, San Francisco & Texas Railway Co., Cecil H. Smith, of counsel.

The writ of error as prayed for in the foregoing petition is hereby allowed this 25th day of October, A. D. 1912.

The writ of error to operate as a supersedeas and a bond for that purpose is fixed at the sum of Twenty-Five Thousand (\$25,000.00) Dollars.

J. R. LAMAR,
*Justice of the Supreme Court of
the United States*" (Rec.
131-132).

Assignments of Error in the Supreme Court of the United States.

"Now comes the St. Louis, San Francisco & Texas Railway Company, plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas erred to the grievous injury and wrong of the plaintiff in error, and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

I.

The Court of Civil Appeals erred in holding that Memory T. Seale at the time of the injury, which caused his death, was not employed in interstate commerce, and that the cause of action for damages on account of his death was not governed by the Federal Employers' Liability Acts.

II.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error: The court erred in refusing to give to the jury special charge No. 13, requested by defendant. The plaintiffs in this case are not shown to be the legal representatives of the deceased, Memory T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant.

III.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error: The judgment of the court in favor of plaintiff, Maude Seale, is contrary to law, and to the evidence in this case, in that the undisputed evidence shows that the deceased, for whose death this suit is brought, was, at the time of his death, engaged in interstate commerce and the right of said plaintiff, Maude Seale, to recover is given by the Act of Congress relating to interstate commerce and to the liability of common carriers to their employes, and no right of action is given for the death to the wife of an employe killed while engaged in such commerce, but is given only to the personal representatives of such deceased employe.

IV.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error: The court erred in refusing to give to the jury special charge No. 14 requested by defendant, as follows:

In no event are the plaintiffs F. H. Seale and J. E. Seale entitled to recover any sum in this case.

V.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error: The judgment of this court is contrary to the law and to the evidence in this case insofar as the same is in favor of the plaintiff, F. H. Seale, in that the undisputed evidence shows that the deceased, Memory T. Seale, on

account of whose death this suit is brought, was at the time of his death engaged in interstate commerce, and the right of said plaintiff, F. H. Seale, to recover on account of said death is governed by the Act of Congress relating to liability of common carriers to its employes in certain cases, and no right of action is given by said act to the parents of the deceased in case where the deceased left surviving him a wife.

VI.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error: The judgment of the court is contrary to law and to the evidence in this case insofar as the same is in favor of plaintiff, J. E. Seale, in that (1) the undisputed evidence shows that at the time of the death of said Memory T. Seale, on account of whose death this action is brought, he was engaged in interstate commerce, and the right of said plaintiff to recover on account of said death is governed by the Act of Congress Relating to the Liability of Common Carriers to its Employes in Certain Cases, and by the provisions of said Act and of the law applicable to this case no right of action is given to the parent of the deceased in cases where said deceased left surviving him a wife, as said deceased in this case did. (2) The undisputed evidence shows that at the time of the death of said Memory T. Seale and at the time of this trial, said J. E. Seale was and is a married woman, whose husband is a party to this suit.

VII.

The Court of Civil Appeals erred in not reversing and rendering the judgment rendered in this case by the trial court.

Wherefore, for this and other manifest errors appearing in the record the said St. Louis, San Francisco & Texas Railway Company, plaintiff in error, prays that the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error, granting it its rights under the statutes and laws of the United States, and plaintiff in error also prays judgment for its costs" (Rec. 132-134).

**Writ of Error to the Supreme Court of the
United States.**

"The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for the Fifth Supreme Judicial District of Texas before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the St. Louis, San Francisco & Texas Railway Company, appellant in said court, and Maude Seale, F. H. Seale and J. E. Seale, appellees in said court wherein was drawn

in question the validity of a treaty or statute of, or any authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or any authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said St. Louis, San Francisco & Texas Railway Company of Texas as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief

Justice of the United States, the 26th day of October, in the year of our Lord one thousand nine hundred and twelve.

James H. McKenney,
Clerk of the Supreme Court
of the United States.

Allowed by: J. R. Lamar, Associate Justice of the Supreme Court of the United States" (Rec. 134-135).

Then follows supersedeas bond which it is not necessary to copy. (See record 136).

Motion of Defendants in Error to Dismiss or Affirm.

"Now come defendants in error and move the court to dismiss this cause for the want of jurisdiction, because the record discloses:

1. There is no petition for writ of error from the Texas Supreme Court to the Texas Court of Civil Appeals, hence it does not appear that the plaintiff in error undertook to have the case reviewed by the highest state court. If, in fact, a petition for writ of error from the Texas Supreme Court to the Texas Court of Civil Appeals was actually filed, its absence from the record fails to disclose to the court whether or not the matters on which plaintiff in error relies to give this court jurisdiction were passed on by the Texas Supreme Court, the highest appellate court of said state.

2. At the time of the granting of the writ of error by a Justice of this court, there was no final judgment in this cause in the State Court such as would authorize the removal of the cause from the State Court to this

court under Section 709 of the United States Revised Statutes.

3. In the trial of the cause in the state court, no issue was determined involving the construction of what is known as the Federal Employers' Liability Act; therefore its validity was not determined by the state court, nor was it construed by said court. It is by reason of said act that plaintiff in error claims jurisdiction in this court.

4. The construction of the Federal Employers' Liability Act was not plead nor raised in the state court in the manner required by the practice of the Texas courts and the decisions of its appellate courts thereon.

5. Said cause was decided upon other issues independent of the construction of the Federal Employers' Liability Act which issues were sufficient upon which to base the judgment of the state court.

In the event the court holds that it has jurisdiction of this cause and overrules this motion to dismiss the same, then defendants in error move the court to affirm said cause, because:

1. It is manifest that the writ of error was taken for delay only, as the question upon which jurisdiction depends is so frivolous as not to need further argument.

2. That the question upon which the jurisdiction of this court depends was so manifestly decided right, that the case ought not to be held for further argument."

**BRIEF OF ARGUMENT ON MOTION TO
DISMISS OR AFFIRM.**

I.

The record fails to disclose a petition for writ of error from the Texas Supreme Court to the Texas Court of Civil Appeals, and therefore it is not shown that the federal question relied on by plaintiff in error was presented to said court, or that the decision of said court thereon was adverse to appellant; and it follows that there is no basis for the jurisdiction of the Supreme Court of the United States.

We refer the court to the record filed herein to sustain our contention that there is no petition for writ of error to the Texas Supreme Court included therein.

It may be a little tedious, but under the peculiar facts of this case, it will be necessary for us to quote quite freely from the Texas Statutes and rules on matters of practice in the state courts.

Articles 1540, 1541 and 1542 of the Revised Statutes of Texas of 1911, governing proceedings to obtain a writ of error are as follows:

"Art. 1540. Any party desiring to sue out a writ of error before the supreme court shall present his petition addressed to said court, stating the nature of his case and the grounds upon which the writ of error as prayed for, and showing that the supreme court has jurisdiction thereof; and the petition shall contain such other requisites as may be prescribed by the supreme court."

"Art. 1541. The petition shall be filed with the clerk of the court of civil appeals within thirty days from the overruling of the motion for rehearing, and thereupon the said clerk of the court of civil appeals shall note upon his record the filing of said application."

"Art. 1542. The clerk of the court of civil appeals shall forward to the clerk of the supreme court the said petition, together with the original record in the case, and the opinions of the court of civil appeals, and the motion filed therein, and certified copies of the judgments and orders of the court of civil appeals."

Articles 1523 and 1524 of the Revised Statutes of Texas, 1911 authorizing the Supreme Court to fix rules for the government of state courts are as follows:

"Art. 1523. The supreme court shall, from time to time, make and promulgate suitable forms, rules and regulations for carrying into effect the articles of this title relating to the jurisdiction and practice of the supreme court."

"At. 1524. The supreme court shall have the power to make, establish and enforce all necessary rules of practice and procedure, not inconsistent with the laws of this state, for the government of said court and all other courts of the state, so as to expedite the dispatch of business in said courts."

Rules for the government of the Supreme Court of Texas:

"1. Applications for writs of error shall be addressed to the court and shall embrace specific assignments of error confined to the points of law presented in the motion for rehearing in the Court of Civil Appeals,

and also presented in the motion for a new trial in the trial court. * * *

Each ground of error must be presented separately by an assignment stating succinctly and clearly the ground of error relied on."

These rules may be found in Vol. 143 of the Southwestern Reporter.

In the absence of a petition for writ of error, how does this court know that the Supreme Court of Texas ever passed on the matters upon which plaintiff in error relies to give this court jurisdiction? In other words, how does this court know that the Texas Supreme Court ever reviewed the Federal Employers' Liability Act or its relation to the case at bar? It was not only necessary, under the Texas practice, that the direct error complained of must be specified, but this court holds that it has no jurisdiction to review a judgment of a state court unless the Federal question was directly passed on by the state court adversely to the party seeking the writ of error.

L. & N. R. Co. v. Smith, Huggins & Co., 204 U. S. 557 (51 L. Ed. 616).

Eric R. R. Co. v. Purdy, 185 U. S. 153 (46 L. Ed. 850).

Mut. Life Ins. Co. of N. Y. v. McGraw, 188 U. S. 308 (47 L. Ed. 484).

The mere fact that there is in the record a judgment of the supreme court denying a writ of error only presumes that one was filed. We cannot guess at what it contained.

II.

At the time of the granting of the writ of error by a justice of this court to the Texas Court, there was no final judgment in the cause in the Texas state court that would authorize the granting of said writ.

Section 709 of the United States Revised Statutes authorizing writ of error from the United States Supreme Court to a State court is as follows:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

The universal construction placed upon this statute is that before a writ of error will lie to remove a cause from the state court to the United States Supreme Court, that the judgment of the state court must be final; that

is, the party applying for the writ of error must have exhausted all means at his disposal to have the same adjudicated by the highest state court having jurisdiction.

Bostwick v. Brinkerhoff, 106 U. S. 3 (27 L. Ed. 73).

Grant v. Phoenix Mut. Life Ins. Co., 106 U. S. 429 (27 L. Ed. 237).

Express Company's case, 108 U. S. 24 (27 L. Ed. 638).

Now, when does the judgment of the Supreme Court of the State become final? Article 1554 of the Revised Statutes of the State is as follows:

"The judgment of the Supreme Court shall be final at the expiration of fifteen days from the rendition thereof, when no motion for rehearing has been filed."

The Revised Statutes of the State of Texas on the matter of procuring a rehearing in the Supreme Court is as follows:

"1561. Any party desiring a rehearing of any matter determined by said (supreme) court may, within fifteen days after the date of entry of the judgment or decision of the court, file with the clerk of said court his motion in writing for a rehearing thereof, in which motion the grounds relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party if known, and if not known, then the name and residence of the opposing party as shown in the record; provided, that should the court adjourn within less time than fifteen days after the rendition of the judgment, it may make such rules and regulations in reference to the filing of the motion as to

it may seem best for the promotion of the interest of all parties concerned."

"Art. 1562. Upon the filing of such motion with the clerk of said court, he shall make a certified copy of such motion and transmit the same by mail to the sheriff or any constable of the county in which the attorney, or opposing party, as the case may be, is alleged in said motion to reside, together with a precept commanding him to deliver the copy of the motion to the person named in such precept."

"Art. 1563. Upon the receipt of such precept and copy of motion by the officer, it shall be his duty to deliver the copy of the motion to the person named in said precept, if found in his county, and to return said precept to the court, by mail, stating thereon at what time, and to whom, he delivered the copy of the motion, or that that the party named in the precept is not to be found in his county, as the case may be."

"Art. 1564. Service of said motion on any one of several parties or their attorneys to a cause shall be sufficient service on all."

"Art. 1565. At any time, after five days from the return of such precept served, it shall be lawful for said supreme court to hear and determine such motion for rehearing, and not sooner."

"Art. 1568. If the costs have not been paid at the end of fifteen days from the date of judgment or from the overruling of a motion for rehearing, the said clerk may issue an execution for the costs of the supreme court and the court of civil appeals, specifying the amount of each, and attaching to said execution a correct list of all costs accruing in each of said courts."

Rule 4 prescribed by the Supreme Court of the State governing applications for rehearing in that court is as follows :

"When the plaintiff in error has failed to file his application within the time prescribed by law, the clerk of this court shall submit the matter to the court before filing same, with any statement of excuse which may be presented by the applicant, and the court will act upon such application to file. If it be refused, then no record will be made of the application or the disposition of it.

When the application shall have been filed for a period of ten days, if the court shall determine to refuse the same, then, whether the defendant has answered or not, the clerk of the court will retain the application, together with the transcript and accompanying papers, for fifteen days from the day of rendition of the judgment refusing the writ. At the end of the time, if no motion for rehearing has been filed, or upon the overruling or dismissal of such motion, in case one has been filed, the clerk of this court shall transmit to the Court of Civil Appeals to which the writ of error is sought a certified copy of the orders of this court denying such application and of the order overruling the motion for a rehearing thereof, and shall return the papers which belong to that court to the clerk thereof, but shall retain the petition for writ of error. A motion for rehearing of an application for writ of error is not a matter of right, but, in case such motion shall be filed within fifteen days after the refusal of the application and before the court shall adjourn for the term, the court will consider the same if it be based upon a ground not embraced in the application or contains the citation of authorities not before cited. The presentation

of any point or points presented in the application without urging some new argument or citing some new authority will be deemed a sufficient ground for dismissing the motion."

This rule was promulgated January 24, 1912, and may be found in Vol. 143 of the Southwestern Reporter.

From the above Statutes and rules, to say the least, the application for and the granting of the writ of error to the State Court by a Justice of this Court was a little premature. The judgment of the Texas Supreme Court refusing the writ of error was of date Oct. 16, 1912 (Rec. 130). It did not become final until October 31, 1912, fifteen days after its rendition. It would not have become final on the latter date in the event plaintiff in error had filed a petition in that court for rehearing, which it had the privilege of doing. In the event a motion for rehearing had been filed in the Texas Supreme Court, then the judgment would not have become final until after it was overruled by that court. The clerk of the Supreme Court could not certify the judgment for observance to the Court of Civil Appeals until after October 31, 1912, and it seems did not do so until November 6, 1912 (Rec. 130). The judgment of the Supreme Court so certified by its clerk was filed in the Court of Civil Appeals on November 7, 1912, and not until that certificate was filed in the Court of Civil Appeals was the judgment final in the latter court. Yet a writ of error was granted to the Court of Civil Appeals by a Justice of the United States Supreme Court on October 25, 1912, six days before the

judgment became final, and six days before plaintiff in error was precluded from filing a motion for rehearing in the Supreme Court, and thirteen days before the Court of Civil Appeals had the official certificate of the clerk of the Supreme Court showing the judgment of that court. Until that was filed, the judgment of the Court of Civil Appeals was not final, and writ of error did not lie to this court. So far as the record discloses, this court does not now know whether the plaintiff in error filed a motion in the Texas Supreme Court for a rehearing of the matter of the refusal of its petition for writ of error. So far as the record discloses, this court does not know that said motion was not granted. In this state of the record, this court cannot take jurisdiction of this cause.

In the case of *Aspen Mining Co. etc. v. Billings*, 150 U. S. 37 (37 L. Ed. 988), the court say :

"The rule is that if a motion or a petition for writ of error is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purpose of the writ of error or appeal."

To the same effect see :

Brockett v. Brockett, 43 U. S. 238 (11 L. Ed. 251).

T. & P. Ry. Co. v. Murphy, 111 U. S. 488 (28 L. Ed. 492).

Memphis v. Braun, 94 U. S. 718 (24 L. Ed. 244).

III.

Neither the pleadings of the plaintiff nor the defendant presented any issue for the construction or application of the Federal Employers' Liability Act; and as plaintiff in error relies solely upon that theory to give the court jurisdiction, there is no federal question upon which to base said jurisdiction.

The petition of defendants in error in the trial court, set out in full in the statement in this brief (Ante p. 7), discloses that the suit was brought solely under the Texas death statute and states no facts whatever that would invoke the application of the Federal Employers' Liability Act (Rec. 1). The plaintiff in error's answer, also set forth in the statement in this brief (Ante p. 14), neither by demurrer nor answer, invokes the application of the Federal Employers' Liability Act (Rec. 6). However, plaintiff in error will doubtless claim that its special demurrers to the petition of defendants in error raised the question. They were, in substance, that the original petition failed to disclose whether the deceased was engaged in interstate commerce at the time of his death and whether the plaintiff in error was engaged in interstate commerce at the time of the death of the deceased (Rec. 6). That these exceptions, under the rules of pleading prescribed by the Supreme Court of Texas for the government of courts, and under the Texas Statutes and decisions, did not in any manner invoke the application of the Federal Employers' Liability Act so as to make the construction thereof an issue in this case, will be shown beyond the peradventure of a doubt in a subsequent por-

tion of this brief, wherein we will review the practice of the Texas State courts. (See subdivision III, *post*, this brief).

In addition thereto, the decisions of the United States Supreme Court have universally held that the issue of a federal question must be raised directly and clearly in the manner and form required by the state practice and not be left to inference.

In the case of *L. & N. R. Co. v. Smith, Huggins & Co.*, 204 U. S. 557 (51 L. Ed. 616), the court say:

"If a party relies upon a federal right, he must specially set it up, and a denial of liability under the law is not a compliance with that requirement. For this we need not cite cases."

In the case of *Erie Railroad v. Purdy*, 185 U. S. 153 (46 L. Ed. 850), the court say:

"Now, where a party drawing in question in this court a state enactment as invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a state denied to him a right or immunity under the Constitution of the United States, did not raise such question or specially set up or claim such right or immunity in the trial court, this court cannot review such final judgment, and hold that the state enactment was unconstitutional, or that the right or immunity so claimed had been denied by the highest court of the state, if that court did nothing more than decline to pass upon the federal question because not raised in the trial court as required by the state practice."

In the case of *Mut. Life Ins. Co. of N. Y. v. McGrew*, 188 U. S. 308 (47 L. Ed. 484), the court say:

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in Sec. 709 (U. S. Comp. Stat. 1901, p. 575), and it is thoroughly settled that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised.

In the case of *Kipley v. State of Illinois*, 170 U. S. 186 (42 L. Ed. 1001), the court say:

"We are of the opinion that this court is without jurisdiction to review the final judgment of the Supreme Court of Illinois in these cases. The answer makes no reference whatever to the Constitution or laws of the United States. It is true that it avers that the Illinois civil service act was 'unconstitutional and void.' But when the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a state, of some title, right, privilege, or immunity secured by the Constitution or Laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege, or immunity was 'specially set up or claimed' under such Constitution or laws. Rev. Stat. 709. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond

question that the party bringing the case up intended to assert a federal right."

See also:

Spies v. Ill., 123 U. S. 131 (31 L. Ed. 85).

Baldwin v. Kans., 129 U. S. 552 (32 L. Ed. 640).

Hamblen v. Western Land Co., 147 U. S. 530 (37 L. Ed. 267).

M. P. Co. v. Fitzgerald, 160 U. S. 49 (40 L. Ed. 536).

Jacobi v. Ala., 187 U. S. 133 (47 L. Ed. 107).

Layton v. Mo., 187 U. S. 356 (47 L. Ed. 216).

In re Buchanan, 158 U. S. 31 (39 L. Ed. 884).

Referring again to the original petition of defendants in error. It will be observed that the right of action was based upon the Texas death statute; that the plaintiff in error filed its special exceptions above referred to, a general denial and special pleas of assumed risk and contributory negligence.

As to the special exceptions to the effect that the petition did not disclose whether the suit was filed under the Federal Employers' Liability Act, the court properly overruled the same, for the reason that the petition is very plain and specific, stating facts which disclosed a right of action solely under the Texas Statutes. Again, after the trial court had read its charge to the jury, plaintiff in error requested a special charge, which was refused by the court, to the effect that the jury should find for the defendant because the parties plaintiffs were not the "legal" representatives of the deceased. This was

properly refused, because there were no pleadings to authorize such a charge.

Taking the rule as laid down by the United States Supreme Court to the effect that the federal question must be presented directly and not by innuendo or inference, can it be successfully maintained for one moment that plaintiff in error has properly raised a federal question in this case?

IV.

No federal question was raised in this case in the manner required by the practice of the Texas courts.

Before discussing the Texas authorities, we call the attention of the court to the case of *T. & N. O. Ry. Co. v. Miller*, 221 U. S. 408 (55 L. Ed. 795), in which this court held that the action of the State of Texas construing the pleadings of a cause was one of practice that would not be reviewed.

Likewise, in the case of *Brinkmeyer v. M. P. R. Co.*, reported in the Advance Sheets of the United States Supreme Court, October Term, 1911, No. 11, page 113, you likewise held that the refusal of the Kansas State Court to permit plaintiff to amend and allege a new cause of action on the theory that the new cause of action would be barred by limitation, was a question of practice of that state which you would not review. Such, as we understand it, is the universal holding of this court on questions of practice in state courts.

The Texas Practice.

It may be truthfully stated that the plaintiff in error has undertaken to invoke the jurisdiction of this court solely upon the ground that the cause of action arose under the Federal Employers' Liability Act, and that the defendants in error were not the proper parties plaintiff. There is no complaint that the trial court failed to charge the jury upon liability as provided by the Federal Employers' Liability Act. No special charges were requested or refused along that line, but it relied solely upon the defect of parties plaintiff.

Before reviewing the Texas authorities, for the convenience of the court we will requote the special exceptions of plaintiff in error and so much of the original petition of the defendants in error as is necessary to show the issues.

Special Exceptions of Plaintiff in Error.

Defendant interposed two special exceptions to plaintiff's original petition, as follows:

"Because the petition does not show whether or not at the time said Seale was injured he was engaged in the handling of interstate commerce."

"Said petition does not show whether or not defendant at the time it committed the acts complained of, was engaged with respect thereto in the handling of interstate commerce" (Rec. 6).

Original Petition of Defendants in Error.

After showing venue and that deceased was killed in the local yards of defendant in Sherman, Texas, it alleges:

"That heretofore, to-wit: On the night of January 16, 1909, Memory T. Seale, was in the employment of the defendant in the capacity of a clerk, known and designated as seal or yard clerk, and performed his duties at night at said above described railway yards and terminals. That on said day, about 7:45 o'clock p. m. he was performing his said duties in said railway yards when defendant recklessly, carelessly and negligently propelled and ran a locomotive against and over deceased, thereby cruelly crushing, wounding and mutilating him to such an extent as to cause his death within a few minutes after he received such injuries. That said Memory T. Seale, hereinafter known as 'deceased' was struck and killed in the following manner, to-wit:

While performing his duties and acting in the scope of his authority, he was on his way from a compartment or building known as a 'box car,' which was, among other things, used as a telegraph station and office, situated on or near the east side of said railway yards, with dispatches, messages and papers to be by him delivered to a clerk in an office building maintained at or near the west side of said yards, when he heard a freight train coming in from the north, bound for said yards and terminals, and was told by the night yardmaster of the defendant, who was then and there the superior of deceased, to hurry up with his errand and return and check up the incoming train, as it was desired to make up a train at once to go out of said terminals to the south, and certain cars would have to be incorporated in said train which were in the train then coming in from the north. That it was then and there the duty of deceased to obey said yardmaster, and it was then and there his duty to check up said incoming train by obtaining the name, number and designation of the cars of said in-

coming train, and report the same to a night yard clerk that had his place of business in the office building in the west side of said yards. That after receiving said instruction from the yardmaster, deceased continued on his way to said office building in the west of said yards, and delivered his dispatches, messages and papers to the night yard clerk therein, and picked up his lantern and started in a northeasterly direction for the purpose of meeting said incoming train, and after he had gotten a short distance from said office the defendant's locomotive engaged in switching and propelling cars in said yards, backing up from the south, came up behind deceased, and diagonally behind him, and without notice or warning struck, ran over and cruelly killed him as aforesaid" (Rec. 2).

From the above excerpt you will observe that it was succinctly set out that deceased was a yard clerk and performed his duties in the railway yards of plaintiff in error at Sherman. That at the time he was killed, he was going to check up the cars of a freight train coming in from the north; that is, get the names and numbers, and that while doing so, he was run over and killed by a switch engine engaged in switching cars in said yards.

The original petition shows a right of action under the Texas Statute.

It is elementary that that no party has to plead the law. He need only plead his facts, and the law follows as a matter of course.

Rule 2 for the government of district and county courts provides as follows:

"Pleadings, with the exception of those presenting issues of law, must be a statement of facts in contradistinction to a statement of evidence, of legal conclusions and of arguments."

It is clear from the full and accurate statement of the facts surrounding the killing of the deceased that the defendants in error had declared upon the State law. It would have added nothing to the petition by stating that defendants in error "claimed under the state law;" that would have been a mere conclusion of law.

See:

Connor v. Hawkins, 64 Tex. 545.

State v. Goodnight, 70 Tex. 688.

Tryon v. Butler, 9 Tex. 553.

The court, by reading plaintiff in error's assignments predicated on the overruling of said special demurrers, will see that it does not undertake to show wherein the allegations are insufficient, but merely that it was entitled to know whether or not defendants in error were suing under the state law or under the Federal Employers' Liability Act. It did know it, if a full and clear statement of defendants in error's cause of action as set out in their petition could show it.

If the plaintiff in error wanted a more complete statement of the facts, it should have plead them itself, because:

The facts were within the peculiar knowledge of plaintiff in error.

Defendants in error had plead their case according to the facts as they understood them that surrounded the immediate death of the deceased. Whether the freight train to which he was going at the time he was killed came from Denison or other stations north of Sherman, or came from Oklahoma into Sherman, or whether it was hauling interstate or intrastate commerce, were facts peculiarly within the knowledge of the plaintiff in error, because the train was in charge of its employes and it had possession of all the records. It follows that it also knew whether or not the deceased was engaged in some act with reference to interstate commerce when he was killed. If it wanted to take advantage of the fact that the right of action arose under the Federal Employers' Liability Act, either to object to parties plaintiff, or to have the merits of the action adjudicated thereunder, it should have plead the facts showing it.

Ry. v. Hennessey, 75 Tex. 155.

Ry. v. Smith, 74 Tex. 276.

Ry. v. Brinker, 68 Tex. 500.

Ry. v. Easton, 21 S. W. 757.

Ry. v. Hawley, 123 S. W. 726.

As said by Mr. Justice Rainey, who wrote the opinion in affirming this case for the Court of Civil Appeals for the Fifth District, the facts alleged in the original petition made a case under the statutes of the State of Texas. That being so, evidently the pleadings of the original petition excepted to were sufficient, and if the

plaintiff in error desired to show that the cause of action arose under the Federal Employers' Liability Act, then it should have plead the facts showing the same. The court will observe that the verbiage of the special exceptions do not claim that the facts are not alleged full enough, but that "the petition does not show whether or not deceased was engaged in handling interstate commerce when he was killed," and that the "petition does not show whether or not defendant was engaged in interstate commerce at the time it committed the act complained of." Invoking the rule that pleadings are construed most strongly against the pleader, it admits that the petition did show the converse, that is, that deceased and defendant were engaged in intrastate commerce when deceased was killed.

It is now apparent to the court, if not it will be further on, that defendant has no complaint to make as to the sufficiency of the allegations of defendants in error's original petition, but it was trying to torture these special exceptions into objections to the right of defendants in error to maintain the suit and thereby claim that the objection to parties plaintiff was made *in limine*, but the wildest stretch of the imagination cannot give them such a meaning.

The court will bear in mind that these special exceptions constitute the only pleading upon which plaintiff in error relies to show that the defendants in error had no right to maintain this suit. Yet there is not the remotest hint in them that defendants in error were not proper parties. They do not squint toward being a plea

in abatement under the rules governing pleadings in this state.

As said by Chief Justice Gaines in the case of *State v. Goodnight*, 70 Texas, at page 688:

"A plea in abatement should not only show the grounds upon which the suit should be abated, but should also give the plaintiff a better writ—that is, it should not only show that the suit is improperly brought, but also how it should have been brought. The plea in this case says that others are interested in parts of the fences, but does not allege in what parts each have an interest, nor does it state the nature of that interest. A pleading should always state facts and not conclusions of law, and a plea in abatement, which sets up a non-joinder of parties defendant should show definitely and specifically the nature and extent of the interest of each person, who is claimed to be a necessary party."

That is authority in Texas, and judged from it, it is not necessary to argue the proposition further.

Without the tediousness of quoting, the plaintiff in error plead general denial, contributory negligence and assumed risk. Yet on the trial it undertook to prove:

That the plaintiff in error and the deceased were engaged in interstate commerce at the time he was killed.

The court permitted the plaintiff in error to show that the train that deceased was going to check up had come from the state of Oklahoma into the Sherman yards and had cars in it that were destined to different

points within the State of Texas. This evidence had absolutely no probative force, because there was no pleading upon which the same could be based.

Moody v. Rowland, 100 Tex. 370.

W. U. Tel. Co. v. Smith, 88 Tex. 13.

Cooper v. Loughlin, 75 Tex. 527.

Mann v. Falcon, 25 Tex. 276.

Hill & Jones v. Jackson, 3 Tex. 209.

In *Moody v. Rowland*, 100 Texas at page 370, Mr. Chief Justice Brown, states the doctrine as follows:

"The evidence, which was admitted, although sufficient to sustain the issue presented in the charge, did not raise that issue before the jury, unless the evidence so admitted would have been admissible, under the general denial, over the objection of the appellee. The fact that the evidence was admitted without objection will not sustain the charge as requested by appellant (*Western U. T. Co. v. Smith*, 88 Tex. 9; *Cooper v. Laughlin*, 75 Tex. 527)."

In the case of *Western Union Telegraph Company v. Smith*, 88 Texas, 13, the doctrine is again stated:

"Facts not alleged, though admitted in evidence without objection, will not support a judgment"

In the case of *Cooper v. Loughlin*, 75 Texas, at page 527, the doctrine is again laid down:

"In the case of *Paul v. Perez*, 7 Texas 345, it is said: 'The principle that the *allegata* must be broad enough to admit all the necessary proof, and that every material fact must be alleged, has often been decided by this court; first solemnly adjudicated in *Mims v. Mitchell*, 1 Texas

443, and sustained by an unbroken train of decisions from that time down to the present. And if there was proof without such *allegata*, it should be disregarded."

The court will bear in mind that the Federal Employers' Liability Act is not invoked in any manner by the plaintiff in error except upon the proposition that the defendants in error had no right to sue as parties plaintiff. In fact, it not only did not plead that the cause of action arose under the Federal Employers' Liability Act, but it made no request of the court, by special charge or otherwise, to submit its rights on the merits of the case under the Federal Employers' Liability Act. The Federal Employers' Liability Act was more favorable to the defendants in error than the State Act, for the reason that the former modifies the questions of negligence and assumed risk. Plaintiff in error is contending in this case that deceased was guilty of contributory negligence as a matter of law, a position it could not take under the Federal Employers' Liability Act. The plaintiff in error, therefore, did not want the merits of the case tried under the Federal Employers' Liability Act; it merely tried to take advantage of the question of proper parties without letting the defendants in error know what its object was.

Again:

The defendant could not prove that it was engaged in interstate commerce at the time deceased was killed, or that defendants in error were not the proper parties to the suit under a general denial.

See:

Guess v. Lubbock, 5 Tex. 535.

Banking Co. v. Stone, 49 Tex. 4.

Insurance Co. v. Davidge, 51 Tex. 244.

Wright v. Wright, 6 Tex. 19.

Parker v. Leman, 10 Tex. 116.

The doctrine is succinctly laid down by the Supreme Court in *Guess v. Lubbock*, 5 Tex. at page 539, as follows:

"We have shown that the only evidence that could have been received under the issue formed by the pleadings was such only as rebutted the truth of the facts stated in plaintiff's petition, or the truth of the facts stated in the second plea. Upon the truth of these rested her right to recover. No evidence as to the disability of the plaintiff to sue resulting from her status as a slave was admissible, because the foundation for such proof was not laid by the *allegata* of either the petition or the plea. The introduction of such evidence was foreign to the issues made by the pleading, and was not entitled to any standing in court. It was calculated to draw the attention of the jury from the issue and to result in a verdict not responsive to it, and it was calling on the plaintiff to meet evidence that could not have been expected under the pleading. If the defendant had intended to have relied on such defense, he should have pleaded it either in abatement of the suit or in bar. Our system of practice (not now for the first time declared from the bench) requires that each party shall make a full disclosure of the grounds on which they respectively rely for success. And it is no answer to say, when improper evidence is objected to on the ground of surprise, that the party had actual notice that such evidence would be offered, because the

party cannot be called upon to prepare against evidence foreign from the issue. Nor could a verdict or judgment founded on such evidence stand in any revising judicial tribunal whatever, however direct the notice to the adverse party may have been. (*Hall v. Jones*, 3 Tex. R., and cases there cited.) We have shown that under the issue the right of the plaintiff to sue could not have been legally passed on by the court, and consequently all the testimony on this subject should have been rejected."

This rule has been followed throughout all the decisions of our state appellate courts from that day to the present. So that, so far as the record is concerned in this case, there is not a line of pleading, or of legitimate evidence, that shows that this cause of action arose under the Federal Employers' Liability Act.

The Special Charge.

After the introduction of proof as to the train that deceased was going to check up when he was killed being an interstate train, without any pleading to that effect, the plaintiff in error undertook to take advantage of the same by a special charge, as follows:

"The plaintiffs in this case are not shown to be the *legal* (italics ours) representatives of the deceased, M. T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum, and you will, therefore, return your verdict in favor of defendant."

The court will observe that up to the requesting of this charge there is nothing in the record to show that plaintiff in error was complaining of the right of the

original plaintiffs to bring this suit. The requesting of this charge is the first stagger at such a contention. A critical examination of the charge will show that it did not then give the defendants in error an intimation of what it was trying to do, because the said charge uses the phrase "legal representatives." While plaintiffs in the original suit were not "personal representatives" of the deceased, they were the "legal representatives." They were shown by the proof to be the wife, father and mother of deceased. Deceased left no children. The term "legal representatives" might possibly be broad enough to include personal representatives, but the general significance of the term indicates "heirs." "Personal" representatives could not include "legal" representatives.

Mr. Chief Justice Gaines, in the case of *Allen v. Stovall*, 94 Texas, 628, draws the distinction as follows:

" 'A representative is one that stands in the place of another as heir or in the right of succeeding to an estate of inheritance; one who takes by representation. Webst. Dic. One who occupies another's place and succeeds to his rights and liabilities. Executors and administrators represent, in all matters in which the personal estate is concerned, the person of the testator or intestate, as the heir does that of his ancestor. Burrill's Law Dic.; 2 Steph. Com. 428. Representatives of a deceased person are real or personal; the former being the heirs at law, and the latter, ordinarily, the executors or administrators. The term representative includes both classes. When the personal representatives alone are intended in a statute, they are so named, and there is no

intimation of an intent to limit the protection and benefit of this exception to the personal representatives. The "real representatives" are as much within the reason for protecting the one class as the other.' The case was affirmed by the Court of Appeals of New York but apparently without a written opinion. See 2 Hand (41 N. Y.) 619. Practically, the same construction was applied in this court in the case of *Grayson v. Winnie*, 13 Tex. 288. In the latter case Chief Justice Hemphill says: 'The section above cited employs the phrase legal representative of the deceased. This is a general term, susceptible of different significations, and perhaps it would have been more judicious to have followed the language of the Act of 1838, viz., executor, administrator, guardian, creditor, or heir. Acts of 1838. There is no room for doubt, under such language, that in proper cases the heir might appear himself and continue a suit begun by the ancestor or by his administrator. We are not to infer, however, that by the change of phraseology the legislature intended to deprive heirs of the power to represent the deceased, they being in fact his real and permanent representatives, the others being appointed and representing him for merely temporary purposes and trusts. *I apprehend that on examination it will be found that in repeated instances in our statutes the terms legal representatives and heirs are of synonymous signification and import.* (Italics ours.) This is not peculiar to our laws, for it will be found that in some of the other states the terms legal representatives have not been considered identical with executors and administrators.' "

Certainly the special charge should have been refused; even if the evidence as to plaintiff in error being engaged in interstate commerce could be considered, be-

cause the defendants in error though not the "personal" representatives, were the "legal" representatives of the deceased, for the reason that they were his heirs. Therefore, neither by special exceptions to the original petition or by plea in abatement, or plea in bar, or by special charge requested, did the plaintiff in error ever intimate to the court that it had any objection to the parties plaintiff prosecuting the suit as such.

Again. If the special charge sufficiently called the attention of the court to the fact that the suit could only be maintained by a personal representative, then we say that there is nothing better established under the rules of pleadings in our state, and practically of all jurisdictions, than that

The Defect of Parties Must be Plead.

The Texas Revised Statutes lay down a definite rule governing the pleadings as to defendants in error's legal capacity to sue, as follows:

"Article 1906. An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit; * * *

2. That the plaintiff has not legal capacity to sue.
3. That the plaintiff is not entitled to recover in the capacity in which he sues."

There is not a line of pleading under oath or otherwise on the part of plaintiff in error objecting to the legal capacity of defendants in error to maintain this suit, and it cannot now complain. When it filed its answer of

general denial and its special pleas of contributory negligence and assumed risk, it thereby waived all defects of parties plaintiff.

Carey v. Brown, 92 U. S. 171 (23 L. Ed. 469).

Greenleaf v. Queen, 1 Pet. 138; 7 L. Ed. 85.

Connor v. Hawkins, 64 Tex. 545.

State v. Goodnight, 70 Tex. 688.

Tyron v. Butler, 9 Tex. 553.

Blum v. Strong, 71 Tex. 329.

31 Cyc. 172, states the proposition broadly that :

"A plea to the merits admits plaintiff's capacity to sue."

Plaintiff in error will not be permitted to lie in ambush, and fail to make the proper objections to parties plaintiff, and raise such matter for the first time after the court has read its charge to the jury. If the objection had been made *in limine*, defendants in error could very easily have cured the defect, if such it was, by amendment.

A similar statute of Louisiana has been so construed by the United States Circuit Court of Appeals for the 5th Circuit Court in the case of *T. & P. Ry. Co. v. Lacy*, 185 Fed. 227, wherein the court say :

"Garland's Rev. Code of Practice of Louisiana, art. 327. An exception, which if sustained would result in the dismissal of the suit, should be pleaded *in limine litis*. Id. art. 344. An exception to the plaintiff's capacity to sue must be pleaded before issue joined. *Legendre v. Seligman, Hellman & Co.*, 35 La. Ann. 113. See also,

Adams & Co. v. Coone, 37 La. Ann. 305; *Heirs of Mason v. Layton*, 38 La. Ann. 675. If there were not statutes or local decisions to sustain the view, we would hold, nevertheless, that a defendant would not be permitted to successfully urge the alleged defect in this court after entering a general denial and trying the case on the merits in the lower court and having failed to suggest the alleged defect in that court."

The same court in *T. & P. Ry. Co. v. Jackson*, 193 Fed. 949, state the doctrine as follows:

"A defendant cannot be permitted to plead to the merits and go to trial, and, after all the evidence is in, avail himself of a defect in the petition which could have been cured by amendment if pointed out by an exception. Where the alleged defect in the petition relates to the plaintiffs' capacity to sue, to take advantage of such defect, it must be pleaded before issue joined. When a defendant intends to resist an action by means of an exception to the right of the plaintiffs to sue, he must plead it expressly in his answer. He is not permitted to avail himself of it after the trial on the merits. These rules are based on the reasonable presumption that if such defect exists as a matter of fact, it would be pleaded *in limine*."

Not by the remotest suggestion could the exceptions urged by plaintiff in error be considered as raising the question *in limine*, because they make no intimation that there is any defect of parties, plaintiff. To repeat, it must be apparent to this court that the plaintiff in error was undertaking to avail itself of the proposition of improper parties plaintiff without letting the defendants in

error know their intention, and thereby prevent them from amending as they might have done if the direct point had been raised.

In the case of *M. K. & T. Ry. Co. v. Blalack* (147 S. W. 559) it was held by the Texas Supreme Court that an allegation was made that would authorize proof that deceased was engaged in interstate commerce at the time of his death, but no proof was made. We think that case applicable conversely on the proposition that in the case at bar there was no allegation made that deceased was engaged in interstate commerce, and the court could not legally permit the plaintiff in error to make proof of same. Therefore, the record does not disclose that deceased was engaged in interstate commerce except by evidence that was not warranted by the pleadings.

On the point that if the direct point had been made by plaintiff in error, either by exception or by answer, that there was a defect to parties plaintiff, defendants in error could have amended.

See:

- Martel v. Somers*, 26 Tex. 551.
- Hudson v. Morris*, 55 Tex. 605.
- Babb v. Rogers*, 67 Tex. 339.
- Connolly v. Hammond*, 51 Tex. 647.
- Killebrew v. Stockdale*, 51 Tex. 531.
- Tarkington v. Broussard*, 51 Tex. 554.
- Scoby v. Sweatt*, 28 Tex. 713.
- Beckton v. Alexander*, 27 Tex. 659.
- Thouvenin v. Lea*, 26 Tex. 614.
- Ry. v. Davidson*, 68 Tex. 370.

M. K. & T. Ry. Co. v. Wulf, decided by U. S. Supreme Court January 16th, 1913, Sup. Court Rep. Vol. 33 p. 85.

The case of *American Railroad Company of Porto Rico v. Birch*, decided by the United States Supreme Court and reported in Advance Sheets of date June 15th, 1912, No. 14, page 603, is not in conflict with but supports our theory. In that case the suit was originally brought by the widow of the deceased, and the defendant railway company raised the direct question, by proper pleading, that the case arose under the Federal Employers' Liability Act and that the widow, as such, had no right to sue. The point was sustained by the court, whereupon the widow and only son of the deceased made themselves parties to the suit as the heirs of the deceased, following a statute of Porto Rico. The defendant railway company again urged the direct point against the right of the widow and son to sue as heirs, on the ground that the suit must be brought by the personal representative of the deceased. The trial court overruled this contention, and the case went to trial. The United States Supreme Court held that the point being raised *in limine* that the point should have been sustained and the case prosecuted by the personal representative. So, that all that case decides is that the personal representative alone has the right to prosecute the suit if the point is raised by proper pleading at the proper time. The court will also note that the Federal Employers' Liability Act applied directly to Porto Rico by its terms (See Sec. 2 of the Act 1st. Session 60th. Congress, Chap. 149, page

65). Porto Rico cannot have intrastate commerce, but is solely under the jurisdiction of the Federal Employers' Liability Act and of the Federal Courts. This case was appealed from the court in Porto Rico direct to the Supreme Court of the United States. The Birches had no right of action except by virtue of the Federal Employers' Liability Act, and had no jurisdiction in which to assert that right except in the Federal Court.

Likewise in Cause No. 517, October term, 1912, *M. K. & T. Ry. Co. v. Wulf*, decided on Jan. 26, 1913, reported in Supreme Court Reporter, Vol. 33, page 85, the Supreme Court of the United States held that if the question of parties was raised *in limine* and the cause of action arose under the Federal Employers' Liability Act, it was the duty of the personal representative to prosecute the suit as party plaintiff. But it held, also, that an amendment could be made substituting a personal representative as party plaintiff more than two years after the death of the party for whom damages were sought, and that the amendment would take effect from the beginning of the cause of action, rather than from the time of the amendment.

The Father and Mother of the Deceased.

It is true in the case at bar that the father and mother of deceased were parties to the suit. As said before, the original petition shows that the case was brought by proper parties under the Texas Statutes for wrongful death. It may be true that if the cause of action arose under the Federal Employers' Liability Act and the matter of the want of proper parties plaintiff had been proper-

ly raised by the pleadings, the court should have required the personal representative to have prosecuted the suit, because the Act of Congress designates such as the party to bring the suit. In that event the father and mother would not be proper parties plaintiff, but we contend, that so far as the record in this case is concerned, the suit arose under the Texas Statute. The parties provided by that statute were the proper parties plaintiff. However, if the court should hold that the record properly discloses that the right of action accrued under the Federal Employers' Liability Act, the verdict must stand, because plaintiff in error failed to raise the question of the want of proper parties in the proper way and at the proper time. The fact that a small pittance was given the father and mother of the deceased by the verdict and judgment would not authorize the verdict and judgment to be disturbed, because Maude Seale is the only person who can complain, and she has not done so.

It is well stated by Mr. Justice Brewer in the case of *Stewart v. B. & O. Ry. Co.*, 168 U. S. 445 (42 L. Ed. 537), wherein a suit was brought in the District of Columbia for the wrongful death of a party in the State of Maryland, that though there was a vast difference in the two statutes of Maryland and the District of Columbia, as to the party who should bring the suit, and as to who were the beneficiaries, yet the courts of either jurisdiction will see that the damages awarded are passed to the proper parties.

That case further lays down the doctrine that for jurisdictional purposes the Federal Courts regard the real, rather than the nominal party to the suit.

V.

This case was decided by the state court upon issues independent of the construction of the Federal Employers' Liability Act. That act was in no manner construed or passed on by the state court. Therefore, no writ of error lies in this case to said state court.

The court will observe that this case was tried solely upon pleadings that alleged a cause of action under the Texas Statute authorizing a recovery for injuries resulting in death, and that none of the state courts, trial or appellate, considered the Federal Employers' Liability Act in issue, or passed on the same in any manner whatever. (See subdivision III, *ante* of this brief).

The Texas Statute authorizing recovery for death is as follows:

"Article 4694. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases:

1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, hirer of any railroad, steamboat, stage coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents; when the death of any person is caused by the negligence or carelessness of the receiver or receivers or other person or persons in charge or control of any railroad, their servants or agents, and the liability of receivers shall extend to cases in which the death may be caused by reason of the bad or unsafe condition of the railroad or machinery, or other reason or cause by which an action may be brought for damages

on account of injuries, the same as if said railroad were being operated by the railroad company.

2. When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another."

"Article 4695. The wrongful act, negligence, carelessness, unskillfulness, or default, mentioned in the preceding article, must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury."

"Article 4698. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been caused, and the amount recovered therein shall not be liable for the debts of the deceased."

"Article 4699. The action may be brought by all of the parties entitled thereto, or by anyone or more of them for the benefit of all."

According to the issue as shown by the pleadings, the cause was tried according to the Texas Statute and that the Federal Employers' Liability Act was not in any manner passed on and considered by the Texas court. Therefore, there is no federal question raised which would authorize the court to take jurisdiction.

Kenebec & P. R. Co. v. Portland & K. R. Co.,
81 U. S., 14 Wall. 23 (20 L. Ed. 850).

Rector v. Ashley, 73 U. S. 6 Wall. 142 (18 L. Ed. 735).

Gibson v. Chouteau, 75 U. S. 8 Wall. 394 (19 L. Ed. 317).

Clinger v. Mo., 80 U. S. 13 Wall. 257 (20 L. Ed. 635).

Detroit City R. Co. v. Guthard, 114 U. S. 133 (29 L. Ed. 118).

In the latter case it was decided that in order to give the Supreme Court of the United States jurisdiction, it must appear affirmatively on the face of the record, not only that a federal question was raised, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case.

That the court may see that the Federal Employers' Liability Act was not passed on by the Texas Appellate Court, we quote the pertinent portions of the opinion of the Court of Civil Appeals:

"We do not think the court erred in overruling the exceptions as stated.

The action was brought under the state law and the petition stated a good cause of action, and was not subject to the exceptions presented. This precise question was passed upon by this court in the case of *Railway Co. v. Neaves*, 127 S. W. 1090, and a writ of error was denied by our Supreme Court, the holding in said case being contrary to appellant's contention.

The evidence shows that at the time Memory T. Seale was killed he was in the employ of appellant in the capacity of yard clerk in the yards in North Sherman, Grayson County, Texas. While in the discharge of his duties as such clerk he was struck and killed by appellant's servants in the negligent operation of an engine.

The court did not err in charging the jury that deceased had just gone to work as yard clerk for appellant. The evidence shows he was killed at night when he had been at work for the first time in that capacity about forty minutes. * * *

The trial court refused a special charge requested by appellant, of which it complains, said charge reading: 'The plaintiffs in this case are not shown to be the legal representatives of the deceased, M. T. Seale, and are not entitled to prosecute this suit, nor to recover in any sum and you will, therefore, return your verdict in favor of defendant.'

The proposition submitted thereunder is: 'The deceased, at the time of receiving the injuries which caused his death, was engaged in interstate commerce, and the cause of action, if any, arising on account of his death is based upon, and controlled by the Act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroads to Their Employes in Certain Cases," commonly called the "Federal Employers' Liability Act," and not the Texas death statute, which was superseded by the said Act of Congress as to causes of action coming within its terms, and since the plaintiffs have not brought themselves within the provisions of said act there can be no recovery on their part in this suit.'

We are of the opinion that the court did not err in refusing said charge. There was no plea in abatement for the want of capacity in plaintiffs to maintain this suit, which was necessary under our statutes to take advantage of such defects, if any, and which plea should be filed in due order of pleading. Rev. Stats., 1268-1269; *Blum v. Strong*, 71 Tex. 328.

The statutes of Texas authorize a recovery by plaintiffs as set forth in their petition, and there was no pleading by defendant setting forth as a defense to said cause the Act of Congress, approved April 22, 1908, entitled 'An Act Relating to the Liability of Common Carriers by Railroads to Their Employes in Certain Cases,' commonly called the 'Federal Employers' Liability Act,' which act, whatever effect it may have upon the statutes, cannot be invoked to defeat plaintiffs' right of recovery in this suit, as it was in no way pleaded by defendant. The plaintiffs are the real beneficiaries. The fact that the suit was not brought in the name of some administrator or executor of the estate of Memory T. Seale, deceased, should not prevent a recovery (Tr. 118-119).

VI.

If the court hold that a federal question is raised, we contend that it is upon a matter so frivolous as not to require argument.

For the sake of argument, concede that the construction of the Federal Employers' Liability Act was raised by the record, or that its construction was necessary in the decision of the case, then what do we find to be the contention of the plaintiff in error? Not that the case was tried under the state, rather than the Federal Statute or that plaintiff in error was deprived of any right or immunity or advantage by reason of the trial of the case, *but merely that there were not proper parties plaintiff*. In other words, that the suit should

have been brought by the personal representative of deceased. Now when it appears that plaintiff in error thought so little of the proposition that it failed to raise the point *in limine*, is it not a frivolous proposition upon which to force the defendants in error into the United States Supreme Court?

VII.

If it should be held by the court that a federal question was raised by the record, or that the final decision in the case necessarily raised said question, then the decision of the state court was manifestly right and could not, under the pleadings, have been decided any other way, and therefore a writ of error to this court does not lie, and the case should be affirmed without being held for argument.

In *Ex parte Spies*, 123 U. S. 182 (31 L. Ed. 85), the court say:

“When, as in this case, application is made to us on the suggestion of one of our number, to whom a similar application had been previously addressed, for the allowance of a writ of error to the highest court of a state under Section 709 of the Revised Statutes, it is our duty to ascertain not only whether any question reviewable here was made and decided in the proper court below, but whether it is of a character to justify us in bringing the judgment here for re-examination. In our opinion the writ ought not to be allowed by the court, if it appears from the face of the record that the decision of the federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our own well considered judgments

in similar cases. That is in effect what was done in *Twitchell v. Commonwealth*, 74 U. S. 7 Wall. 321 (19; 223), where the writ was refused, because the questions presented by the record were 'no longer subject to discussion here,' although if they had been in the opinion of the court 'open' it would have been allowed. When, under Section 5 of our Rule 6, a motion to affirm is united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm when 'the question on which our jurisdiction depends was so manifestly decided right, that the case ought not to be held for further argument.' *Arrowsmith v. Harmoning*, 118 U. S. 194 (30; 243); *Church v. Kelsey*, 121 U. S. 282 (30; 960)."

If, notwithstanding the Texas courts held that under the pleadings in this case it was properly tried under the Texas death statute and that the Federal Employers' Liability Act was not involved, yet if this court holds that the record discloses that the right of action accrued under the Federal Employer's Liability Act, the case should be affirmed, because the Texas courts had a right to try a cause of action arising under The Federal Employer's Liability Act, according to the pleading and practice of the State courts.

In the case of *Mondou v. Ry. Co.*, 223 U. S. 1 (56 L. Ed. 327) the court held that a cause of action arising under The Federal Employer's Liability Act could be enforced in the state courts according to the rules of pleading and practice of state courts.

Now authorized by Act of Congress giving Federal and state courts concurrent jurisdiction (U. S. Stat. 1910-'11, Part 1, page 1095).

This cause has been properly tried under the Texas rules of pleading and practice, and it is immaterial whether the right of action arose under the Texas or the Federal Statute. The question of parties not having been raised *in limine*, plaintiff in error cannot now complain.

Besides, the United States Supreme Court has always announced the doctrine that it looks to the real rather than the nominal party, and that whatever recovery might be had for the death of a person, the courts would see that it went to the proper beneficiaries.

Stewart v. B. & O. Ry. Co., 168 U. S. 448 (42 L. Ed. 539).

Van Doren v. Pa. R. Co., 93 Fed 261.

McDonald v. Neb., 101 Fed 171.

While the last case is a decision of the Circuit Court of Appeals, it collates the authorities very fully, and we invite the attention of the court to the same, if it should have any doubt on the matter. According to these authorities, this court would have decided the case at bar as did the Texas courts, therefore the decision of the Texas courts was manifestly right.

We earnestly insist that there is absolutely no merit in the writ of error and that this cause should be dismissed; or, in the alternative, affirmed without being set down for further argument.

JUDSON H. WOOD,
JAMES P. HAVEN,

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Seale and J. E. Seale, De-
fendants in Error.*

ST. LOUIS, SAN FRANCISCO & TEXAS RAILWAY
COMPANY *v.* SEALE.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 857. Argued May 5, 1913.—Decided May 26, 1913.

Where the Federal Employers' Liability Act is applicable, the state statute on the same subject is excluded by reason of the supremacy of the former.

Where the Federal Employers' Liability Act applies, no one but the injured employé or, in case of his death, his personal representative, can maintain the action.

Whether the Federal or state statute is applicable depends upon whether the injuries of the employé were sustained while the company was engaged and the employé was employed in interstate commerce.

An employé whose duty is to take the numbers of, and seal up and label, cars, some of which are engaged in interstate, and some in intrastate, traffic, is directly and not indirectly engaged in interstate commerce.

Interstate transportation is not ended by the arrival of the train at the terminal. The breaking up of the train and moving the cars to the appropriate tracks for making up new trains for further destination or for unloading is as much a part of interstate transportation as the movement across the state line.

Where plaintiff's petition states a case under the state statute, but on the evidence it appears that the case is controlled by the Federal statute, and the defendant has duly excepted, the state court is bound to take notice of the objection and dismiss if plaintiff is not entitled to recover under the Federal statute.

THE facts, which involve the construction of the Employers' Liability Act of 1908, and its effect on actions for personal injuries of employés brought in the state courts, are stated in the opinion.

Mr. Cecil H. Smith, with whom *Mr. W. F. Evans* was on the brief, for plaintiff in error.

Mr. Judson H. Wood, with whom *Mr. John P. Haven* was on the brief, for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action against a railroad company, by the widow and parents of one of its employés, to recover damages for his death while in its service in its railroad yard at North Sherman, Texas, the death being caused, as was alleged, by the negligence of other employés. The action was begun in one of the courts of the State and resulted in a judgment for the plaintiffs, which was affirmed by the Court of Civil Appeals. 148 S. W. Rep. 1099. A petition for a writ of error was denied by the Supreme Court of the State, and the present writ of error to the Court of Civil Appeals was then allowed. See *Bacon v. Texas*, 163 U. S. 207, 215; *Norfolk & Suburban Turnpike Co. v. Virginia*, 225 U. S. 264, 269.

A motion to dismiss the writ is interposed, but the grounds of the motion are plainly untenable, and it is denied.

In the trial court and again in the Court of Civil Appeals the railroad company contended that the injuries which caused the death of the deceased were received while the company was engaged, and while he was employed by it, in interstate commerce; that its liability for his death was exclusively regulated and controlled by the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149; and that, if liable, it was liable only to his personal representative and not to the plaintiffs or any of them. This contention was denied by both courts, and the correctness of that ruling is the matter now to be considered.

The cause of action sought to be enforced was not recognized at common law. *Michigan Central Railroad Co.*

v. *Vreeland*, 227 U. S. 59, 67. It was essential, therefore, that it be based on some applicable statute. There was a Texas statute on the subject and also the Federal one. Both could not occupy the same field, and they were unlike. The Texas statute gave the right of action to the "surviving husband, wife, children and parents" and provided that it might be enforced by all of them or by one or more for the benefit of all, while the Federal statute vested the right of action in the deceased's "personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé." There were other points of dissimilarity, but they need not be noticed. If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the National Constitution. *Second Employers' Liability Cases*, 223 U. S. 1, 53; *Michigan Central Railroad Co. v. Vreeland*, *supra*. And if the Federal statute was applicable, the right of recovery, if any, was in the personal representative of the deceased, and no one else could maintain the action. *Briggs v. Walker*, 171 U. S. 466, 471; *American Railroad Co. v. Birch*, 224 U. S. 547, 557; *Missouri, Kansas & Texas Railway Co. v. Wulf*, 226 U. S. 570, 576; *Troxell v. Delaware, Lackawanna & Western Railroad Co.*, 227 U. S. 434, 443. The real question, therefore, is, whether the Federal statute was applicable, and this turns upon whether the injuries which caused the death of the deceased were sustained while the company was engaged, and while he was employed by it, in interstate commerce. *Second Employers' Liability Cases*, *supra*; *Pedersen v. Delaware, Lackawanna & Western Railroad Co.* (decision announced with this, *ante*, p. 146).

The plaintiffs' petition was altogether silent upon that subject, and the defendant, by appropriate special exceptions, called attention to the two statutes, insisted

that whether one or the other applied depended upon facts not stated, and asked that the plaintiffs be required so to state the facts as to enable it to perceive which statute was relied upon. The exceptions were overruled, and when that matter came before the Court of Civil Appeals it said: "The action was brought under the state law, and the petition stated a good cause of action and was not subject to the exceptions presented." By its answer the defendant put in issue the allegations of the petition, and the evidence adduced upon the trial established without dispute the following facts:

The defendant was a Texas corporation owning and operating a railroad extending from the boundary between Oklahoma and Texas southward through North Sherman. This railroad connected at the Oklahoma boundary with another one extending northward through Madill, and the two were so operated that trains were run through from North Sherman to Madill and from Madill to North Sherman. The defendant was engaged in both intrastate and interstate commerce, much the larger part of the traffic handled in its North Sherman yard being interstate. The deceased was employed by the defendant as a yard clerk in that yard, and his principal duties were those of examining incoming and outgoing trains and making a record of the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with the conductors' lists, and of putting cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing, trains. His duties related to both intrastate and interstate traffic, and at the time of his injury and death he was on his way through the yard to one of the tracks therein to meet an incoming freight train from Madill, Oklahoma, composed of several cars, ten of which were loaded with freight. The purpose with which he was going to the train was that of taking the

numbers of the cars and otherwise performing his duties in respect of them. While so engaged he was struck and fatally injured by a switch engine, which, it is claimed, was being negligently operated by other employés in the yard.

At the conclusion of the evidence the defendant requested the court to direct a verdict in its favor on the ground that the undisputed evidence disclosed that the case was one in which the defendant's liability was controlled by the Federal statute, and that, if liable, it was liable only to the personal representative of the deceased, and not to the plaintiffs. The request was denied, and the jury returned a verdict for the plaintiffs, in which the damages were apportioned among them conformably to the state law.

In its original opinion the Court of Civil Appeals took the view (a) that by not interposing a plea in abatement the defendant waived any right it had to object that the plaintiffs were not personal representatives of the deceased, (b) that the plaintiffs were the real beneficiaries and it was immaterial that they were not the deceased's personal representatives, and (c) that the state statute authorized a recovery by the plaintiffs on the case stated in the petition, and as the Federal statute was not pleaded as a defense it could not be invoked to defeat a recovery, no matter what may have been its effect on the state statute. In its opinion on the motion for rehearing the court recognized the supremacy of the Federal statute, if applicable, and held that the evidence did not bring the case within that statute. While recognizing that the train which the deceased was proceeding to examine was an interstate train, having just come from Oklahoma, the court said: "The North Sherman yards were the terminal for that train, that is, that was the end of the run of that train. If any trains went south, they were made up in the yards, new trains, and sent south, or other

trains made up and sent north. The evidence does not show that any of the cars in the train coming in were destined for other points."

In our opinion the evidence does not admit of any other view than that the case made by it was within the Federal statute. The train from Oklahoma was not only an interstate train but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line. *McNeill v. Southern Railway Co.*, 202 U. S. 543, 559. See also *Johnson v. Southern Pacific Company*, 196 U. S. 1, 21.

It comes then to this: The plaintiffs' petition, as ruled by the state court, stated a case under the state statute. The defendant by its special exceptions called attention to the Federal statute and suggested that the state statute might not be the applicable one. But the plaintiffs, with the sanction of the court, stood by their petition. It was to the case therein stated that the defendant was called upon to make defense. A plea in abatement would have been unavailing, because the plaintiffs were the proper parties to prosecute that case. When the evidence was adduced it developed that the real case was not controlled by the state statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute,

that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state courts erred in overruling it. Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited. See also *Tiffany on Death by Wrongful Act*, 2d ed., §§ 80, 109, 116.

The judgment is accordingly reversed and the case is remanded for further proceedings not inconsistent with this opinion, but without prejudice to such rights as a personal representative of the deceased may have.

Reversed.

MR. JUSTICE LAMAR dissents.